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CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 474. 167.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL., APPELLANTS,

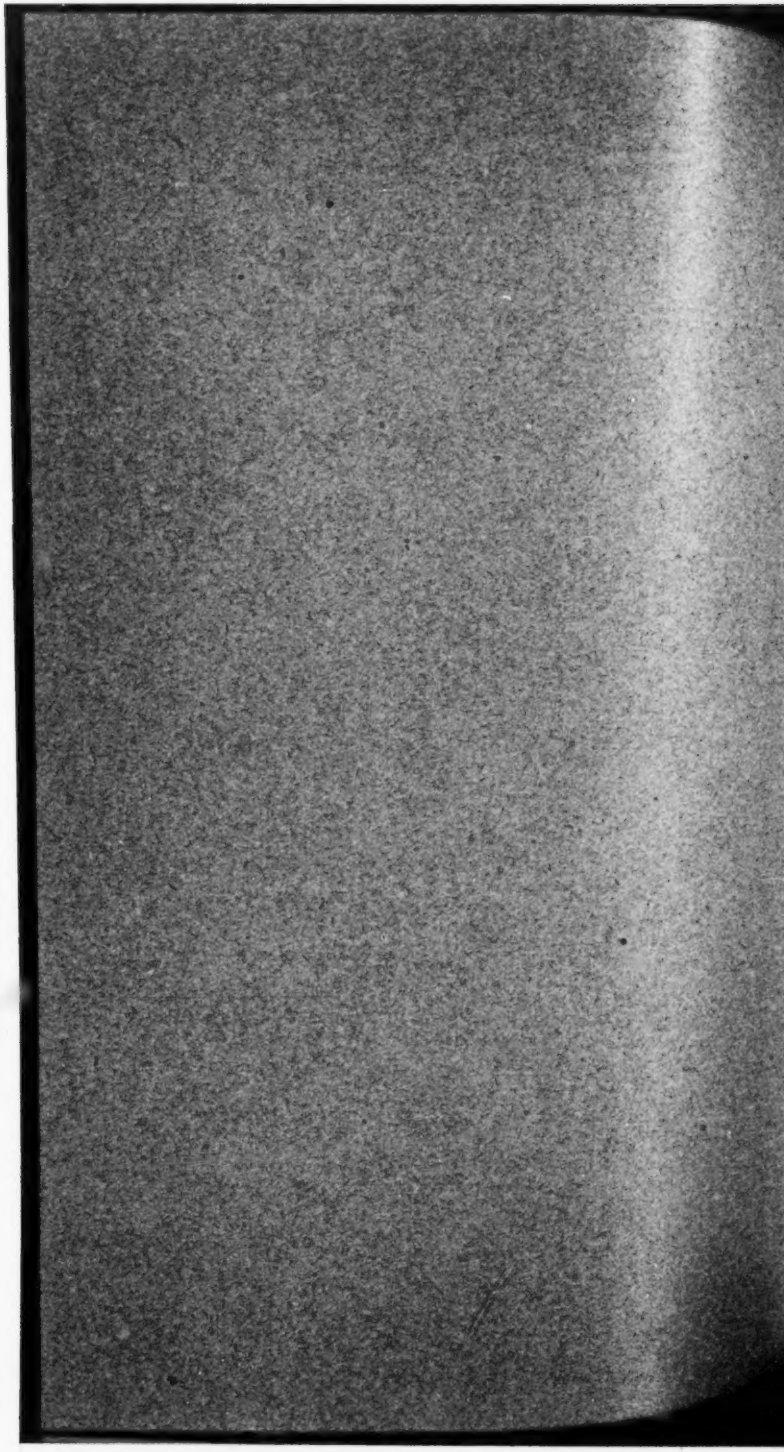
vs.

W. N. COLER & COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED DECEMBER 15, 1899.

(17,585.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 10, 1900.

1 *Certified Questions of Law.*

Filed Nov. 17, 1899.

United States Circuit Court of Appeals, Fourth Circuit.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY *et al.*, Appellants,
vs.
W. N. COLER & COMPANY, Appellees.
No. 319.

Appeal from the circuit court of the United States for the western district of North Carolina, at Greensboro.

This is to certify that W. N. Coler & Company, of New York city, in manner and form as set out therein, filed their bill in equity in the circuit court of the United States for the western district of North Carolina, on the 22nd day of February, 1898, against The Board of Commissioners of Wilkes County and others of Wilkes county, North Carolina, alleging:

1. That the complainants, W. N. Coler, W. N. Coler, Jr., Bird S. Coler, James W. Campbell, and Francis W. Coler, are each
2 and every one, a citizen, and resident of the State of New York, and are bankers, under the name and style of W. N. Coler and Company; and the said complainants bring this their bill of complaint against The Board of Commissioners of Wilkes County, each and every member of said board being a citizen and resident of the State of North Carolina, and of the county of Wilkes, and within the western district of North Carolina; and also bring this, their bill of complaint, against Clarence Call, ex-sheriff and ex-treasurer of Wilkes county, and also against John H. Johnson, sheriff and *ex officio* treasurer of Wilkes county, within said district; and thereupon your orators complain and say:

1. That the matter in dispute exceeds, exclusive of interest and costs, the sum and value of two thousand dollars, this suit being to recover from the respondents, the sum of four thousand and two hundred dollars ($4,200.00) and to enjoin the respondents, from paying out, or in any manner disposing of, or interfering with, a sum of money, to wit: thirteen thousand dollars ($13,000.00), held by respondents, Clarence Call and John H. Johnson, sheriffs, and *ex officio* treasurers, as above set out, the said sum being amount due holders of coupons, interest on certain bonds, hereinafter mentioned, other than is directed by this court, the said sum of forty-two hundred dollars ($4,200.00) being due upon the coupons held by the complainants, the said coupons being the obligations of the said county, to pay the complainants said amount.

2. That your orators, under the firm name of W. N. Coler & Company, are engaged in the banking business in the city and State of New York, and as such, are buyers and sellers of municipal bonds.

3. That, as such, your orators bought, for valuable consideration, and for a large sum, the highest market price, a great number of bonds, to wit: fifty-five (55) county bonds of the denomination of one thousand dollars each, bearing interest, at the rate of six per centum, payable on the 1st day of April and 1st day of October, in each and every year. That the purchase of the said bonds was for value, in good faith, and without notice, express or implied, that there was any suggestion of their being void, invalid, fraudulent, or otherwise than perfectly legal, in their issue and sale.

4. That the total issue of bonds by the said county in pursuance of the authority and power conferred upon the board of com-
3 missioners of the same, and in pursuance of which power, the said bonds held by complainants were issued, as aforesaid, was in the amount of one hundred thousand dollars ($100,000), all of which bonds, as complainants are informed and believe, were sold, as aforesaid, and are owned, and have been in possession of *bona fide* holders, for value, without notice, and the interest on the same has been paid regularly at the times set out in this bill, for seven years, as complainants are informed and believe, the said bonds having been issued in the year 1889.

That a levy upon the property of the tax-payers of the county has been made, and the interest collected by the sheriff of the said county of Wilkes for each and every year, for eight years, as complainants, your orators, are informed and believe.

5. That the interest due and payable, as aforesaid, on about the first of April and October of each and every year, upon the bonds, held by complainants, as herein set out, is evidenced by certain coupons attached to said bonds, as follows, to wit:

2 coupons due April, 1896, from bonds Nos. 73 and 84..	$60 00
60 coupons due April, 1898, from bonds Nos. 4, 8, 9, 11, 13, 28, 31, 33, 37, 39, 43, 49, 56, 59, 63, 76, 78, 81, 83, 84, 86, 90.....	1,800 00
48 coupons due October, 1898, from bonds Nos. 4, 11, 13, 15, 17, 19, 21, 24, 28, 31, 33, 37, 43, 48, 56, 59, 63, 69, 72, 74, 76, 78, 81, 83, 85, 86, 88, 90.....	1,440 00
	$3,300 00

and the said sum is the interest due and still unpaid upon the bonds issued and purchased by your orators, complainants in this bill; and also the sum of nine hundred dollars, evidenced by other coupons in the hands of your orators and owned by them, the same attached to the said bonds. That the above sum your orators have demanded of respondents by presenting the said coupons, as has heretofore been done, when payment was made, at the fourteen times, as aforesaid.

6. That, although the said sum of thirteen thousand dollars, collected from the tax-payers of the said county, by reason of a levy made by the board of commissioners, in pursuance of the power conferred upon the same, is in the hands of the said respondents, the said sheriffs, *ex officio* treasurers of the said county of Wilkes,

for the purpose of paying the said interest, due and payable
4 on the 1st of April, 1896, on the 1st of April, 1898, and on the 1st of October, 1898, they, the said respondents, refuse to pay the same to the holders of the said coupons, your orators and complainants. That having received the said amount, for the purpose aforesaid, and only for that purpose, they, the said sheriffs, *ex officio* treasurers, and the respondent, The Board of Commissioners, under and by virtue of whose orders the said treasurers hold the said amount, have become trustees of the bond and coupon holders, between whom—your orators and them—there exists a relation fiduciary in its character, they, the said respondents, holding the said sum, for the use of, and in trust for, your orators, complainants, and for other bondholders, whoever, and wherever they are, or may be.

7. That as your orators are informed and believe, the reason the said *ex officio* treasurers of the county of Wilkes, have not accounted with complainants, as under the rules of equity and good conscience they are required to do, being, as they are, trustees, as aforesaid, is the fact, that the said board of commissioners, or its predecessors—the board of commissioners being a continuous body—sued out a certain process of injunction from one of the superior courts of North Carolina, within said western district, and caused the same to be served upon them, or the one of the said *ex officio* treasurers, holding the said sum, enjoining them, from accounting with the holders of any of the said bonds and coupons, and from paying over to them the interest due as aforesaid, which interest the board of commissioners has caused to be paid into the hands of the said *ex officio* treasurers, and to be held by them for the sole purpose of the payment of the said interest, due and payable as hereinbefore set forth.

8. That the proceedings in the said superior court of North Carolina, it being for the county of Wilkes, in which, this injunction was obtained, was begun in the name of the Board of Commissioners of said county, and, in the name of one C. C. Wright, an alleged tax-payer, as plaintiffs, against Clarence Call, sheriff, and *ex officio* treasurer of the county, as defendant, on the 23rd day of December, 1897. That the complainants, your orators, were not made parties to the same, nor was any other *bona fide* bondholder, made a party, as your orators are informed and believe. And your orators do further say, as they are advised and believe, that they, as such bondholders, are in no manner affected by the judgment or decree of the said State superior court, which granted the injunction, as aforesaid.

5 9. Your orators do further say that this proceeding in the State court was taken and commenced eight years after the issue of these said bonds, and purchase of the same, by complainants, your orators; and, as they are informed and believe, for the purpose of repudiating the honest debt of the county, contracted and made in good faith, by the said county, which received full value and consideration for the same. That, as your orators are informed and believe, the said respondents, The Board of Commis-

sioners, purposely avoided making the bondholders, your orators' or any other bondholders, parties defendants in the State court proceeding, to prevent a removal of the suit to the jurisdiction of this, the circuit court of the United States.

10. That, on the 18th day of February, 1898, the judge of the State superior court, signed an injunction order, "that *that* defendant, Clarence Call, sheriff, of Wilkes county, be, and he is hereby, enjoined, and restrained," from paying any portion of the moneys in his hands, to the coupon-holders, in discharge of the interest due and payable, as aforesaid.

11. That the defendant in the said proceeding, *Clarence Call*, excepted to the order of the said superior court, and appealed to the supreme court of North Carolina, from the same.

12. That, after the said order of injunction was issued, in the said State court, and after the appeal was taken by the said Clarence Call, sheriff, and *ex officio* treasurer, on motion of counsel for J. M. Turner, and J. M. Wellborn, and by consent of the plaintiffs, the said Turner and Wellborn, as the alleged owners of one of the bonds of the county of Wilkes, were allowed to make themselves parties to the said proceeding, as defendants.

13. That, on the 8th day of March, and after the time had expired within which, the said defendant, Clarence Call, sheriff, was allowed to serve his statement of case, on appeal, to the supreme court of North Carolina, the said Turner and Wellborn filed an answer, in the said proceeding, asking that their rights as bondholders, be adjudicated.

14. That, on the 22nd day of March, 1898, on motion of counsel for plaintiffs in the said proceeding, the said superior court adjudged that the bonds were void, the board of commissioners, not having the power to issue the same.

15. That, on the 9th day of November, 1898, the supreme court of North Carolina, affirmed the judgment of the said superior court.

6 16. That the said proceeding, in the State court, in which the said order of injunction was issued, was purely an *ex parte*, collusive one, as your orators are informed, advised and believe, it being, in the first instance, an action by a principal to prevent an agent from doing a thing which the latter could not do, without the order of the former. The said sheriff and *ex officio* treasurer is under the control of the county commissioners, as is prescribed in the Code of North Carolina, and could not pay money out, except by order of the board. That in this proceeding in the State court there were no adverse parties, and there could, under the laws of the State, be no action such as would authorize any court of the State, in the exercise of its jurisdiction, to take cognizance of.

16. That said Turner and Wellborn, as complainants are informed and believe, were no adverse parties in this proceeding, but were made parties defendants by the court, and at the instance of the plaintiffs in the same. That, as the complainants, your orators, are further informed and believe, they do not own the said bond,

as alleged in their answer, filed in the State court, but obtained the same for the purpose of becoming parties to the proceeding, and, to the end, that they might aid the plaintiffs in their effort to effect a repudiation of the said county bonds. That they avow, even now, as your orators are informed and believe, their purpose was, and is, to have these bonds declared null and void. That they did not appear in the supreme court, by counsel or otherwise, at the hearing of the appeal; nor did the defendant, Call, appear in said court. That, as your orators are informed and believe, the expenses incurred by the said Turner and Wellborn, in becoming parties to the said proceeding, have been paid by the commissioners for the county, and, although the defendants in the supreme court of the State, were adjudged to pay the costs of the proceeding, and execution for the same was issued against the said Turner and Wellborn, and their sureties on their appeal bond, yet, the same was paid by order of the county commissioners out of the funds of the county, in the sum of $24.30.

17. That, as your orators are further informed and believe, the said Turner and Wellborn have sued out a writ of error to *to* the Supreme Court of the United States, ostensibly for the purpose of reversing the judgment of the supreme court of North Carolina, in this proceeding, when really it is for the purpose, and to the end,

7 that the decree of this court, in this suit, now begun by your orators, may be anticipated. That, as your orators *and* informed and believe, the commissioners of the said county of Wilkes have agreed to pay the expenses, costs, &c., of suing out the said writ of error out of the county funds.

18. That your orators, complainants, are advised, and believe that there is no Federal question involved in the proceeding in the State court, and, upon inspection of the record in the same by the Supreme Court of the United States, the said writ of error will be dismissed.

19. That the North Western North Carolina Railroad Company, was chartered, by an ordinance of the constitutional convention of North Carolina, ratified the 8th of March, 1868, and published as chapter 17 of the ordinances of said convention. A copy of said ordinance is hereto attached, marked Exhibit A.

20. That, by virtue of said ordinance, the North Western North Carolina Railroad Company, was organized, on April 17th, 1868.

21. That, your orators are advised and believe that the bonds in the sum of one hundred thousand dollars, issued by the board of commissioners of Wilkes county, as set out in this bill, were legally issued, and authorized, by the original charter, granted by the convention in 1868, and by an act of assembly of the 11th of August, 1868, which is in the following words:

"SECTION 1. The General Assembly of North Carolina do enact that an ordinance entitled 'An ordinance to incorporate the North Western North Carolina Railroad Company,' ratified the 9th day of March, A. D. 1868, be and the same is, hereby re-enacted, ratified and confirmed:" and also, by sections 1896 and 1897 of the Code of North Carolina: and also, by an act of the General Assembly of

North Carolina ratified 20th day of February, A. D. 1879, entitled an "Act to amend the charter of the North Western North Carolina railroad, for the construction of a second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county." Also by act of March 2nd, 1881, Exhibit G, hereto attached. Copies of these acts and sections of the Code, are attached hereto, and marked B, C, D and E.

22. That the county of Wilkes, acting through its board of commissioners, and in accordance with the ordinance and acts, as above set out, subscribed the sum of one hundred thousand dollars to the capital stock of the North Western North Carolina Railroad Company, the proposition to subscribe the said amount having
8 been submitted to the qualified voters of the county, at an election held according to law, and a large majority of the said qualified voters, having voted in favor of the same.

23. That in return for, and in consideration of, said subscription, the said North Western North Carolina Railroad Company issued to the county of Wilkes, stock in, and to, the amount of one hundred thousand dollars, which stock the said county now holds, as your orators are informed and believe, and has held, since the issue of the said bonds, in the year 1889. That the said county, by reason of the holding of the said stock, has been represented on the board of directors of the said company, and continued to be until the said sale of the road was made, by decree of this court, in 1894. That the county of Wilkes long desired the completion of this railroad, and by reason of the same, has received great benefit, in the increased value of the lands of the county, and transportation facilities, for freight and passengers. That this railroad is the only one running within the limits of the county, and has been taxed by the county, each and every year since its construction.

24. That the said bonds, hereinbefore *delivered* and set out, were issued to the corporation by the said county on or about October 1st, 1889, in payment of the said subscription. A copy of the bond is hereto attached, it being one of the series issued, and is marked F.

25. That after the issue of the said bonds to the North Western North Carolina Railroad Company, they were duly exposed to sale, by said company, and your orators bought, as hereinbefore set out, those which they now hold, paying for them a large sum of money, the highest market price.

25*a*. That the validity of the bonds of the county of Forsyth, similar to the said bonds of the county of Wilkes, issued under the ordinance of the convention of 1868, has been upheld, by the supreme court of North Carolina in two cases, to wit: Hill *vs.* Commissioners of Forsyth County, 67 N. Car. R., 367, and Belo *vs.* Commissioners, &c., 76 North Carolina Rep., 489. That this ordinance of the convention of 1868, is the one, incorporating the North Western North Carolina Railroad Company.

That the complainants, your orators, purchased these bonds, relying upon their being legal and valid obligations of the county of Wilkes; that, at the time of their issue and purchase, these bonds,

and like bonds of other counties, were regarded and treated
9 as valid securities by the corporate authorities of the county of Wilkes, and other counties of the State; that they were so regarded and treated by the public, by the legal profession, and by the legislative, executive and judicial departments of the State. That the decisions of the supreme court of the State before, at the time of, and since, the issue of the said bonds until 1897, appear to have assumed the validity of these bonds. That there was in North Carolina, a settled course of decisions of the court from 1870 to 1897, construing the constitution and statutes of the State, in favor of the validity of these bonds and like bonds. That there was an action begun in the county of Wilkes some years ago, as your orators are informed and believe, for the purpose of invalidating these bonds, and abandoned. That there never has been a pretence on the part of any one that these bonds were not issued in good faith, and that the county of Wilkes did not receive full value in return for same.

26. That the sheriff of the county of Wilkes, and *ex officio* treasurer, and ex-sheriff and *ex officio* ex-treasurer of the said county, and board of commissioners are, as your orators are advised, contending with one another for the possession of this sum of money, to wit: thirteen thousand dollars, which is in the hands now of the ex-sheriff, Clarence Call and John H. Johnson, sheriff and treasurer; and, unless restrained by the order and decree of this court, will make away with, or dispose of, the said sum, as your orators are advised, having refused to pay over the same, as received, and by such refusal, the said parties, respondents, have committed a breach of the trust reposed in them, and ignored their obligations, as hereinbefore set out. The amount due your orators is defined, set apart, and an acknowledged debt, in its nature accompanied by a right to the appropriation of the said sum, in the hands of the respondents, for its payment, your orators having an interest in the said sum and a lien thereon, under the conditions hereinbefore recited.

27. That, as advised, your orators say they are entitled to have an account stated between them and the respondents, to ascertain the condition of the sum held by respondents for them; and to ascertain what they are to receive upon their coupons; and they are further advised that, according to the rules of this court, they are entitled to have an injunction upon the said respondents against disposing of the said *said* sum or any part of the same, in any other manner, than under the decree of this court; and, further, to have a receiver appointed to hold the said sum, as the agent and officer of this court.

10 Wherefore, the premises considered, your orators pray:—

1. That this honorable court enter a decree compelling the taking and statement of an account as set out in this bill; that an injunction issue upon the respondents, as set out in the bill, also; and that a receiver be appointed as set out therein.

2. That, if, in the opinion of this court, after reading the foregoing bill it shall be deemed advisable to do so, notice be issued to J. M. Turner and J. M. Wellborn to show cause why they should

not be made parties to this suit, and requiring them to answer on oath as to the truth of the allegations and charges made against them in this bill.

3. That, if, in the opinion of this court, it shall be deemed advisable, notice be issued to all bondholders having an interest in the said sum to appear and file with the master, the receiver, their coupons, to the end that their rights may be ascertained, and amounts due them stated in the account, to be taken.

4. That not only a writ *of injunction*, conformably to the prayer of this bill be issued, and receiver be appointed, but, also, a writ of subpœna of the United States of America, directed to the Board of Commissioners of Wilkes County and Clarence Coll, ex-sheriff and ex-treasurer, and John H. Johnson, sheriff and treasurer of said county, commanding them on a certain day to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem proper, and required by the principles of equity and good conscience.

5. That, if in anything your orators are mistaken in the relief prayed for, then they pray for all such other, further and general relief as the premises may warrant, and the rules of equity allow.

To this bill of complaint the respondents filed the following answers:

The Board of Commissioners of Wilkes County, the above-named respondents, reserving to themselves the right to demur to the jurisdiction of the court, for answer to the bill of complaint of the plaintiff-, says:

1.

That in answer to the first paragraph of the bill of complaint, these respondents say that they have no knowledge or information sufficient to form a belief as to the allegation that the plaintiffs are the holders of what purport to be the bonds of the county of Wilkes; but if it be true that they had such papers, these respondents are advised by counsel, and therefore allege that they are invalid for want of authority of law in the Board of Commissioners of Wilkes County to issue such bonds or create a bonded indebtedness against said county under either the statute recited as authority in the face of such pretended bond, or by virtue of any power conferred by any other acts of the General Assembly of North Carolina relied upon by the complainants to sustain their authority.

2.

That the allegations contained in paragraph second of the bill of complaint are, as respondents are informed and believes, true.

3.

That respondents have no knowledge or information sufficient to form a belief as to the price paid by the complainant- for bonds; but respondents deny the truth of the allegation that such bonds were purchased without notice express or implied that they were void and invalid, and aver that there was

no act of the General Assembly of North Carolina which authorized the Board of Commissioners of Wilkes County to create such bonded indebtedness. Respondents especially aver that the amendments to the charter of the North Western North Carolina Railroad Company are void for the reason, that they were not enacted in accordance with the mandatory requirements of article 2, section 14 of the Constitution of North Carolina, including in the amendments to which this foregoing averment applied, not only those enacted by the General Assembly at its session of 1879 and 1881, respectively, but also to the amendments of said charter enacted at the special session of 1868 of the General Assembly of North Carolina, and in reference to said last-named amendment, respondents aver that, if it had not been invalid because not enacted in accordance with said requirements, it nevertheless upon its face failed to confer or purport to confer any authority to issue bonds or to lay a special tax to pay the same other than to the county of Forsyth. These respondents further aver that the original charter of the North Western North Carolina Railroad Company was enacted as an ordinance of the constitutional convention of 1868 and went into effect and became operative before the ratification of the constitution framed by said convention on the 24th of April, 1868, for the reason that certain restrictive clauses contained in articles 5 and 7 of said constitution, limited the powers of the counties and other municipal corporations by proscribing conditions precedent to the exercise of authority by them to create such bonded indebtedness and rendered it necessary that new enabling acts should be passed by the General Assembly after the ratification of the constitution on said 24th day of April, 1868, in order to clothe such municipal corporations with power to create such indebtedness, as respondents are advised.

4.

These respondents admit that the Board of Commissioners of Wilkes County issued without authority of law what purported to be bonds to the amount of one hundred thousand dollars ($100,000), and aver that said bonds were issued without authority of law, and that all purchasers of such bonds are required to look to the legal authority for their issue and in contemplation of law were charged with the nature of the said insufficiency of the statutory authority relied upon.

12 Respondents admit that interest on said bonds was paid for eight years, but deny that, as respondents are advised, the payment of interest on such void bonds can impart validity to them.

5.

Respondents have no knowledge or information sufficient to form a belief as to the allegations contained in the 5th paragraph of the bill of complaint and therefore demand strict proof.

6.

These respondents admit that no interest has been paid by the county of Wilkes on the said pretended bonds since December, 1897, but deny the allegation therein contained that the defendants, The Ex-Treasurer and the Treasurer of Wilkes County, sustained a fiduciary relation to the complainants or that such relation exists between these respondents and the complainants, as respondents are advised and believe.

7.

These respondents, still denying that fiduciary relation exists, admit that their predecessors in office, whose term expired on the first Monday in December, 1898, did bring an action to enjoin Clarence Hall, then *ex officio* treasurer of Wilkes county, and that an order of injunction was granted in the superior court of Wilkes county, which upon a subsequent appeal to the supreme court of North Carolina was held to be the proper exercise of the extraordinary powers of the court, and that it appeared in said action that there was fund in the hands of said treasurer, collected under a levy made for the purpose of paying the interest on such pretended bonded debt semi-annually.

8.

These respondents admit that said action was brought in the name of the Board of Commissioners of Wilkes County and C. C. Wright, a tax-payer, but upon information and belief deny the allegation that no bondholder was made a party, and aver, upon information and belief, that one J. M. Turner and J. M. Welborn were on motion made defendants in this action, and claiming as the holder of one of the said pretended bonds, and after inviting all other holders of such bonds to join with them, appealed from an adverse judgment of the superior court of Wilkes county to the supreme court of North Carolina, upon the hearing of which appeal it was adjudged that the said bonds were invalid.

13 9.

Respondents aver that the action in the State court referred to in the 9th paragraph of the complaint was brought by their predecessors in office, but, as respondents are advised and believe, the said action was brought under the advice of counsel that the said bonds were void *ab initio*, for want of lawful authority to issue them, and that all purchasers are charged with notice of such defect of power, and that it was a refusal to pay an invalid debt, not a repudiation of a valid obligation, and respondents are advised that the supreme court of North Carolina, by its adjudication in said action, sustained the contention of their predecessors.

Respondents have no information as to the motives which induced their predecessors in office to bring said action in the courts of the State of North Carolina, but are advised that citizens of the State are not required to apologize for seeking redress or protection from

any courts of competent jurisdiction. Upon information and belief, respondents aver that the counsel for their predecessors in office would, when said action was brought, have made any bondholders who could be reached by the process of said courts parties defendant, if they had known of any such holders.

10.

Respondents admit the truth of the allegations, contained in the tenth (10) paragraph of the complainants' complaint.

11.

Answering the eleventh paragraph of the complaint, these respondents admit that on the 18th day of February, 1898, the Hon. Henry R. Starbuck adjudged after a hearing upon an order to show cause, that the defendant therein, Clarence Call, should be enjoined and restrained until the final hearing of this cause from paying any portion of the interest on the bonds in controversy, and respondents further admit and aver that on the 18th day of February, 1898, the said Starbuck, judge, as aforesaid, entered upon the back of said restraining order, or injunction, the following memorandum or order of appeal:

"To this judgment defendant excepts, 15 days *allows* defendant to serve statement of case on appeal and 10 days thereafter allowed pl'ff to serve exceptions or counter-statements. Appeal bond fixed at $100. H. R. Starbuck, judge."

14 Further answering said section 11 of complaint, these defendants aver that under the provisions of 550 of the Code of North Carolina, the defendant, Call, as they are advised, would have been allowed but ten days from the entry of appeal taken on said 18th day of February to prepare and serve his statement of case on appeal but for the stipulation of opposing counsel to agree to 15 days, but, as respondents are informed and believe, and are advised, before the expiration of the said 15 days from said 18th day of February, Lindsey Patterson, Esq., counsel for the said Clarence Call, sheriff and *ex officio* treasurer as aforesaid, notified A. C. Avery, of counsel for the plaintiff in said action, that he, the said Patterson, would not perfect or prosecute said appeal, and that, as respondents are informed and believe, the said Patterson notified said Starbuck, judge, before the expiration of the said 15 days of his purpose to abandon such appeal, and that the said Starbuck informed the said Avery that the said Patterson had so communicated his purpose to him. Respondents further answering said last-named paragraph, say that, as they are informed and believe, on the 7th day of March, 1898, at the spring term of the superior court of Wilkes county, and after the expiration of the said 15 days from the said 18th day of February, and before any motion was made for a final judgment, the said J. M. Turner and J. M. Welburn moved the said court, as the owners of one of the bonds in controversy, to be allowed to become parties defendants, and said order was on the same day allowed by Coble, judge, presiding, and was filed on the 18th of March, 1898, upon which day also the said Turner and

Welburn, in pursuance of said order, filed their answer in said action.

Further answering said last-named paragraph of bill of complaint, these respondents aver that, as they are informed and believe, on said 8th day of March, 1898, the counsel for the plaintiff in said action, and R. N. Hackett, counsel for the defendants, Welburn and Turner, upon a suggestion of the Hon. Albert Coble, judge presiding, that he was the brother-in-law of the said J. Lindsey Patterson, who was not only counsel for the said Clarence Call, but was also counsel for his stepmother and the stepmother of the wife of Judge Coble, and that the stepmother, Mrs. Patterson, was the holder of several thousand dollars of said Wilkes County bonds, agreed that the said Coble might make a consent order that a motion which had been made on the filing of said answer on behalf of said Turner and Welburn to vacate the restraining order theretofore made by said Starbuck, at chambers, might be heard before said Starbuck, judge, and that thereupon the said motion was heard by the said Starbuck at chambers, at Morganton, on the 22nd day of March, 1898, and that from a refusal of this said motion the defendants, Turner and Welburn, appealed to the supreme court of North Carolina, upon the hearing of which appeal the said bonds were adjudged to be void and invalid, as aforesaid.

12.

That for answer to the 12th paragraph, these respondents refer to the averments above set forth in answer to paragraph 11.

13.

These respondents admit that the defendants, Turner and Welburn, were allowed, as aforesaid, to file an answer after the expiration of the time allowed said Call, but respondents are advised that the said answer was filed in accordance with the established practice of the said courts before any final judgment had been prayed, or any final judgment had been entered in this action.

14.

Answering the 14th paragraph of the complaint, these respondents admit that the superior court adjudged upon the hearing that the bonds were void for want of power in the commissioners to issue them.

15.

That the allegations contained in the 15th section of the complaint are admitted to be true.

16.

These respondents are advised by their counsel that the legal opinion contained in the 16th paragraph of the bill of complaint, to the effect that the said action was a proceeding instituted by a principal against an agent, is erroneous, and in conflict with the opinion of the supreme court of North Carolina construing its own

statutes, and in defining the duties and powers of its own officers thereunder, as appears in the opinion of Board of Education *vs.* Commissioners, 113 North Carolina, at pages 379, 388, 389. These respondents deny the allegations that there was no adverse party to said action, and aver that, had the said Call paid out the funds in his hands levied for the purpose of paying the interest on said bonds to the holders of the said bonds contrary to the orders of the said commissioners of the county of Wilkes, — would not, as
16 respondents are advised by counsel, have had any redress under the law as construed by the supreme court of the State against said treasurer officially or upon his bonds. Further answering, the respondents say that they are advised that the supreme court of North Carolina passed upon an appeal in a similar case brought for a similar purpose, wherein the only parties were the commissioners of Stanley county, as plaintiffs, and the treasurer of said county, as defendant, and that it was the duty of the said court, of its own motion, to dismiss where there was a want of jurisdiction, and these respondents are advised that the said court, in legal contemplation, gave its sanction to the right to maintain said action against said treasurer.

That these respondents have no personal knowledge as to whether the said Turner and Welburn are or not the owners of the said bonds, but are informed and believe that the said Turner and Wellburn are ready to file affidavits that they are the *bona fide* owners of the bond claimed by them, and, upon such information and belief, these respondents aver that they are such true owners. These defendants have no knowledge or information as to the purpose of the said Turner and Welburn in making themselves parties to said action, and, therefore, hold the plaintiff to strict proof of the allegation that their purpose was to effect a repudiation of said bond.

Further answering the said last-named paragraph of the bill of complaint, respondents say that the said Clarence Call, after the expiration of his term of office as sheriff, being still *ex officio* treasurer of Wilkes county, appear*ing* before two of these respondents, to wit: Leander Jennings and William Barlow, in the absence of the chairman of the board, John T. Peden, at a meeting held soon after their induction into office, and exhibited the execution for the costs of the said appeal to the supreme court of North Carolina, and insisted that the said judgment was against him, Call, as well as against said Turner and Welburn, and insisted that it was the duty of the respondent board to pay said execution, and the said Call insisted, among other things that he, as treasurer, was a party to said action, that it was the duty of the commissioners to hold him harmless, and that he had the promise of the old board that he would be subjected to no costs, and that he had paid the bill of costs presented, and demanded credit for said payment on the settlement which he was then making, and, thereupon, the two respondents above named, under a mistake as to their official duty, and not through any wrongful or collusive purpose, consented to allow the amount of the said superior court judgment which had been thereto-
17 fore paid by said Call, to be a credit in his favor in said settle-

ment with him as sheriff and tax collector, and respondents understood their counsel to assent to the allowance of said credit.

17.

Answering section 17 of the bill of complaint, these respondents say that it is true, according to their information and belief, that the said Turner and Welburn have sued out a writ of error to the Supreme Court of the United States, but it is not true that these respondents have entered into any agreement with the said Turner and Welborn to pay the costs of suing out the said writ of error out of the county funds as alleged, and these respondents have no knowledge or information sufficient to form a belief as to the making of any agreement by their said predecessors in office to pay any such costs.

Further answering said section of the bill of complaint, these respondents say that it is a matter of law for the court to determine whether there is a Federal question involved in such appeal, and respondents are advised that all judges of the circuit court of the United States are not only willing but anxious to be anticipated in passing upon controversies by a court whose adjudications are the supreme law of the land and are more than willing that the law's delays should be prevented by such speedy adjudication.

18.

19.

That these respondents admit that the North Western North Carolina Railroad Company was chartered by the constitutional convention of North Carolina in 1868, as alleged in complaint.

20.

That those respondents have no knowledge or information sufficient to form a belief as to the time when the North Western North Carolina Railroad Company was organized, and therefore hold the complainants to strict proof as to the allegation that said company was organized April 16th, 1868.

21.

Answering the section of the bill of complaint mentioned 21 in the copy of the bill of complaint served on them, these
18 respondents say that neither the act ratified on the 11th day of August, 1868, nor the act ratified on the 18th day of February, 1879, nor the act of March 2, 1881, mentioned in the said section of the complaint, were enacted in the manner prescribed by section 14, article 2 of the constitution of North Carolina, and every one of the said acts is null and void by reason thereof, and constitutes no authority for the issue of said bonds. The said ordinance of the convention of 1868 is not re-enacted or ratified or confirmed by said void act, because of said defect in the manner of its enactment, and the said original charter fails to confer the authority

to create such bonded debt, because it was not supplemented by the enactment of any valid, enabling act as an amendment to said original charter, as these respondents are advised by counsel. Further answering said section, these respondents say that the sections of the code attached to the bill of complaint and marked Exhibits B, G, D and E do not constitute lawful authority for issuing said bonds, because said statutes are not local and special, as required by sections 1, 6 and 7 of article 5 of the constitution of North Carolina, and are insufficient as authority for issuing said bonds, and respondents say further that said sections of code failed to authorize the issue of said bonds, because said Northwestern North Carolina railroad was not within the meaning and proper construction of section 1996 of the Code, one in which the citizens of the county of Wilkes had an interest, nor was the subscription made necessary to aid in the completion of the same.

Further answering said section, these respondents aver the said bonds each contained a recital upon its face (as will appear from an inspection of Exhibit F, attached to complaint) that the said bonds were issued by virtue of authority conferred by the act of February 20th, 1879, which is for the reason aforesaid null and void and no law. These respondents, therefore, aver and plead that, as they are advised, the complainants are estopped from claiming that they were issued by any other authority or pretended authority than the said void statute.

22.

These respondents, still denying the authority of the former commissioners to issue bonds or subscribe to the capital stock to the said company, admit that they did subscribe and issue bonds in the amounts alleged in the complaint, and that it was ascertained and declared that a majority of the qualified voters of Wilkes county had voted in favor of making such subscription and that it is now too late to question said finding as to said vote.

19 23.

These respondents admit that the said company issued certificates, as alleged, of stock to the county of Wilkes, but aver that, according to their best information and belief, the franchise and property of the said company were heavily mortgaged for the completion of the road to Wilkesboro, and from the date of said certificate of stock, and the said mortgages were foreclosed, as alleged in the complaint. Further answering said section, respondents are advised that it is not material that they should give their opinion as to what the county of Wilkes long desired, if it can be truly said of a municipal corporation that it is capable of desiring improvements.

24.

Section 24 of the complaint is admitted to be true.

25.

That respondents have no knowledge or information sufficient to form a belief as to the truth of the allegation contained in section 25 of the complaint, and, therefore, hold the complainants to strict proof.

25*a*.

Answering the section of the complaint mentioned in the copy served on these respondents as 25*a*, these respondents say that the questions involved in this controversy were not adjudicated either in the case of Hill *vs.* Commissioners of Forsyth County, 67 N. C., 367, nor in Belo *vs.* Commissioners, 76 N. C., 489, for the reasons:

1st. That the contract of subscription between the said county of Forsyth and the North Western North Carolina Railroad Company was a completed contract before the ratification of the said constitution of 1868 on the 24th day of April, 1868, and no enabling act was necessary under restrictive clauses of said constitution not then in force.

2nd. Because it did not appear in evidence on the trials of said cases that the said act of August 11th, 1868, had not been passed in accordance with the requirements of the constitution, section 14, article 2, and was, therefore, void. Further answering said section, these respondents say, that, as they are advised by counsel, neither the payment of interest on these bonds by the county of Wilkes nor the acknowledgement of its governing authorities, the commissioners, was sufficient to impart validity to bonds for want of authority to issue them or to relieve the purchasers of the duty of looking to the authority under which they were issued.

These respondents especially deny that, as they were advised by counsel, there was any adjudication or decision in the supreme court of North Carolina construing the constitution and statutes of said State so as to create a rule of property before said bonds were issued in the year 1889, which can be invoked, notwithstanding the later decisions of said court, but, as they are advised, the allegations that there were any such decisions contained in said section, are not true.

26.

That it is true that John H. Johnson is the present sheriff and that Clarence Call is treasurer until September, 1898, by reason of having received the tax-lists of 1898 before said Johnson was elected and qualified as sheriff, and it is admitted that an action has been brought by these respondents against the said Call and his sureties upon his official bond to recover not only a portion of the said tax fund levied to meet the interest on said bonds, but also the general tax. Further answering the said section, these respondents say that they are informed and believe and advised by counsel that one J. Gordon Hackett had been appointed by virtue of an order in the said action carried as aforesaid by a writ of error to the Supreme Court of the United States and receiver was ordered to take charge

of all of the said fund collected by virtue of such levy to meet the interest of the said bonds, and had qualified as such receiver before the bill of complaint was filed in this cause, and respondents are advised that this court has no jurisdiction of the said fund, has no authority to make any order as to the jurisdiction of the same since it was in contemplation of law, in custody of the superior court of Wilkes county before this suit was brought.

27.

That respondents are advised that the question whether the complainants are entitled to the relief demanded in section 27 of the complaint is one of law, and, under advice of counsel, respondents deny the right of complainants to such relief.

28.

Further answering the bill of complaint, these respondents say that they have acted in reference to said bonds and the tax levied for their payment in perfect good faith, and, in order to pro-
21 tect all parties, had entered upon their minutes before the bringing of this suit an order forbidding the defendant, Johnson, *ex officio* treasurer of Wilkes county, from paying out any portion of the said fund collected under the levy to meet the interest on said bonds, as aforesaid, and that said Johnson, treasurer, has now in his hands about seven thousand one hundred dollars of said fund.

A. C. AVERY.
T. J. DULA.
FINLEY & GREEN.

W. F. Barlow, a member of the respondent Board of Commissioners, being duly sworn, maketh oath that the facts stated in the foregoing answer, as of his own knowledge, are true and that those facts stated therein on information and belief, he believes to be true.

W. F. BARLOW.

Sworn to and subscribed before me this the 3rd of April, A. D. 1899, as witness my hand and official seal.

[SEAL.] L. BUMGARNER, *C. S. C.*,
By H. T. SMOOK, *D. C.*

Endorsed: Filed in this office April 18th, 1899. Sam'l L. Trogdon, clerk.

Supplemental Answer of the Board of Commissioners of Wilkes County.

UNITED STATES OF AMERICA:

In the United States Circuit Court, Western District of North Carolina.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. CAMPbell, and Francis B. Coler, under the Name and Style of W. N. Coler & Company, Complainants,

versus

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and CLARence Call, ex-Sheriff and *ex Officio* & ex-Treasurer, and John H. Johnson, Sheriff and Treasurer *ex Officio* of Wilkes Co., Respondents.

22 The defendants, The Board of Commissioners of Wilkes County, now, and at all times hereafter, saving to themselves all and all manner of benefit or advantage of exceptions or otherwise that can or may be had or taken to the many errors, uncertainties and the imperfections in the said bill contained, for further answer thereto, or to so much thereof, as these defendants are advised is material or necessary for them to make answer to, answering, in addition to the answer hereto verified but filed at the hearing with this supplement, says:

1.

Further answering the said bill of complaint, this defendant says that it is informed and believes that the action entitled "The Board of Commissioners of Wilkes County and C. C. Wright *versus* Clarence Call and others" referred to in the bill of complaint as having been adjudicated in the supreme court of North Carolina, had before the filing of the said bill been carried by writ of error to the Supreme Court of the United States, has since held that the Federal courts are bound to follow the adjudications of the State courts in that case, and affiant is advised by counsel that if such has been adjudication of said court the holders of one of the bonds in controversy having been parties to said action, the question involved in this cause and set forth in the bill of complaint as the plaintiffs' ground of complaint having been adjudicated, *and* the plaintiffs are estopped from denying that the bonds in controversy are invalid for want of authority in the said board of commissioners to issue them, and this defendant is further advised, informed and believes that after said action had been carried by writ of error to the said Supreme Court, and while it was there pending the superior court of Wilkes county, in the exercise of its rightful jurisdiction, and to the end that the fund mentioned in the bill of complaint as collected under a special levy to meet the interest on the bonds in controversy and as being in the hands either of the defendant Call or the defend-

ant Johnson be protected and preserved to await the orders of the court to be made in pursuance of the adjudication of the Supreme Court of the United States, made, upon petition in said action, an order, which was signed by Starbuck, resident judge of the judicial district in which Wilkes county is situated, and having rightful jurisdiction in the premises, by which order it was adjudged that Gordon Hackett *the* appointed receiver to take charge of and hold under the direction of said superior court all funds that might be collected by the tax collector of Wilkes county as a special tax to meet the interest on said bonds. (A copy of the record in said case, including said order appointing a receiver, is hereto attached marked Exhibit K.)

23 2.

And this defendant is advised, informed, and believes that, upon the making of said order, the said superior court acquired jurisdiction to appoint a receiver and to control the said fund as collected, and to hold the same subject to the action of said higher court, and this defendant, therefore, being so advised, specially avers and pleads that this court has no jurisdiction to appoint a receiver, because the said court, which is one of concurrent jurisdiction, had already assumed control of the said fund before the bill of complaint was filed.

And this defendant is further advised, informed and believes the question and issues involved in this controversy and set up as a cause of action, or the grounds of the suit in the bill of complaint, *has* already been adjudicated finally by the Supreme Court of the United States upon the hearing on the said writ of error, in which action the holders of one of said bonds had made themselves parties and had invited all other holders of said bonds to join them as parties defendants, and that said adjudication has been made since the same bill of complaint was filed, and this defendant specially avers and pleads that the plaintiffs are estopped by the said adjudication and will be finally estopped by the rendition of a final judgment in the superior court of Wilkes county upon the coming down of the certificate therein, and this defendant prays the court to continue the case until the coming down of said certificate, to the end that he may be enabled to properly plead as a defense that the questions and issues involved in this controversy have been so finally adjudicated and that the plaintiffs are estopped.

3.

Further answering the said bill of complaint, this defendant says that it is advised, informed, and believes that the bonds in controversy were issued and the debt apparently evidenced thereby was created without authority of law by the predecessor in office of the present Board of Commissioners of Wilkes County — is involved, and this defendant is ready to surrender and orders a surrender of the certificates of stock issued to it by the North Western North Carolina Railroad Company, which has always been worthless, because of a mortgage executed contemporaneously with its issues.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill
24 charged, without this, that there is any other matter, cause, or thing, in the said plaintiffs' said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

A. C. AVERY,
T. J. DULA,
FINLEY & GREEN, *Attorneys.*

Answer of Clarence Call.

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

W. N. COLER ET AL.
vs.
THE BOARD OF COMMISSIONERS OF WILKES County, Clarence Call, ex-Sheriff, *et al.* } Answer of C. Call.

Clarence Call, *answer* the complaint in the above-entitled cause, says:

1. That paragraphs 1, 2, 3, 4, 6, 7, 9, 10, 11, 12, 13, 14, 15, 19, 20, 22, 23, 24 & 27 are true.

2. That paragraphs 5, 8, 21 & 25 — supposed to be true.

3. That paragraph 16 is not denied, except the charge of collusion between this affiant and the plaintiff in the injunction proceedings in the State courts, which is denied.

4. That this defendant can neither admit nor deny paragraph 16, but says, in reply thereto, that after the injunction proceedings had been heard by Judge Starbuck, that this defendant concluded he would not perfect his appeal—said decision being in favor of the county, and believing that said judgment would stand till reversed, thought it best for the county that he should not appeal, and shortly thereafter, to his surprise, the counsel for the county of Wilkes, in said suit, wanted him to appeal to the supreme court of North Carolina, and when he declined was offered to be indemnified against any cost he might incur by reason of said appeal, including his attorney's fee for arguing said case in the supreme court, and it was after this defendant's positively refusal to carry up said appeal that Welborn and Turner, by some means unknown to this defendant, became parties to said proceedings, and an appeal by them was perfected, and the case carried to the supreme court of North Carolina, and while Judge Starbuck's decision was affirmed, the cost of said appeal was paid by Wilkes county. That this defendant was

treasurer of Wilkes county for four years, and that he never heard of Welborn or Turner owning a county bond till about the time they became parties to said suit.

5. That this defendant can neither admit nor deny paragraph 17, but says, in reply thereto, that while the county of Wilkes, in addition to attorneys' fees, was to pay expenses of said attorneys in conducting said suit, and while said expense accounts had from time to time been filed, and allowed, and paid, at a special meeting of the Board of County Commissioners, in November, 1898, an order was passed allowing Judge Avery $600.00 for expenses without filing any expense account, and when no expenses were then unpaid, said sum of $600 to be paid out of any funds in the treasurer's hands, except school funds and State taxes, and a claim was issued for said $600.00, and a demand was made on this defendant while treasurer of Wilkes county to pay said claim out of the bond fund then in his hands. That on the 1st Monday in December, 1898, a new board of commissioners took charge, and at their meeting in January, 1899, rescinded the $600 allowance to Judge Avery for expenses, and directed that notice be given to counsel to file itemized statement of said expenses, and at the February, 1899, meeting, the counsel for the county advised the county commissioners that, if forced to file an itemized statement of where the $600 was to be used, that it would show their *bond* to the bondholders, and could not at that juncture afford to do so, as this defendant is informed and believes, and whether for this cause or another, the order of $600 was reinstated and now stands on the claim book of Wilkes county, and affiant believes that, but for the temporary order issued in this cause, that said $600 would have been paid out of the bond funds. And defendant further says that, in conversation with P. A. Lomax, former chairman of the board of commissioners, affiant asked said chairman why they allowed the $600 without any account being filed therefor, and said chairman replied, "for reasons best known to ourselves."

6. That in answer to paragraph 26, this defendant says there is now no controversy between the parties therein referred to—this defendant has paid to his successor in office, J. H. Johnson, all of the bond fund, except the levy made in 1898, and this sum he is ready to pay when due, and while this defendant does not believe that his codefendants, of their own motion, would make way with the bond fund, still, unless restrained by this court, orders will be continually drawn upon J. H. Johnson, treasurer, or J. G. Hackett, State court receiver, and a good portion of this money will go in this way.

And this defendant, having fully answered, asks that such order be signed by your honor as will clearly define the duties of the defendants during the pendency of this litigation—such an order as will be a protection to the county officials, as well as to the bondholders.

Personally appeared Clarence Call, and makes oath that the facts set forth in the foregoing answer are true, except as to the matters

stated on information and belief, and as to those matters he beli-ves — to be true.

(Signed) C. CALL.

The defendant, John H. Johnson, now and at all times hereafter saving to himself all and all manner of benefit or advantage of exceptions or otherwise that can or may be had or taken to the many errors, uncertainties and the imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised is material or necessary for him to make answer to, answering says:

1.

That he has read the answer of his codefendant, The Board of Commissioners of Wilkes County, and that he is informed and believes the matters of defense and the facts stated in said answer are true, and this defendant adopts the said answer and prays that it may be treated as his own answer to each and every section of the bill of complaint.

2.

Further answering the said bill of complaint, this defendant says that he is informed and believes that the action entitled "The Board of Commissioners of Wilkes County and C. C. Wright *versus* Clarence Call and others," referred to in the bill of complaint as having been adjudicated in the supreme court of North Carolina, had been carried by writ of error to the Supreme Court of the United States, and that the said Supreme Court of the United States has held that the Federal courts are bound to follow the adjudications of the State courts in that case, and affiant is advised
26 by counsel, that if such had been the adjudication of said court the holders of one of the bonds in controversy having been parties to said action, questions involved in this cause and set forth in the bill of complaint as the plaintiffs' ground of complaint have been adjudicated, and the plaintiffs are estopped from denying that the bonds in controversy are invalid for want of authority in the said board of commissioners to issue them, and this defendant is further advised, informed and believes that after said action had been carried up by writ of error to said supreme court, and while it was there pending, the superior court of Wilkes county, in the exercise of its rightful jurisdiction, and to the end that the fund mentioned in the bill of complaint as collected under a special levy to meet the interest on the bonds in controversy and as being in the hands either of the defendant Call or this defendant, be protected and preserved, to wit: the orders of the court to be made in pursuance of the adjudication of the Supreme Court of the United States, made, upon petition in said action, an order, which was signed by O. H. Allen, judge *riding* — the judicial district in which Wilkes county is situated, and having rightful jurisdiction in the premises, by which order it was adjudged that Gordon Hackett, be appointed receiver to take charge of and hold under the direction of said superior court all funds that might be collected by

the tax collector of Wilkes county as a special tax to meet the interest on said bonds.

3.

And this defendant is advised, informed and believes, that, upon the making of said order, a copy of which certified under the seal of the clerk of the superior court is hereto attached, marked Exhibit A, the said superior court acquired jurisdiction to appoint a receiver and to control the said fund as collected and to hold the same subject to the action of said higher court, and this defendant therefore, being so advised, specially avers and pleads that this court has no jurisdiction because the said court, which is one of concurrent jurisdiction, had already assumed control of the said fund before the bill of complaint was filed.

And this defendant is further advised, informed and believes the questions and issues involved in this controversy and set up as a cause of action or the grounds of the suit in the bill of complaint, *has* already been adjudicated finally by the Supreme Court of the United States upon the hearing on said writ of error, in which action the holders of one of said bonds had made themselves parties and had invited all other holders of said bonds to join them
27 as parties defendants, and that said adjudication has been made since the said bill of complaint was filed, and this defendant specially avers and pleads that the plaintiffs are estopped by the said adjudication and will be finally estopped upon the rendition of a final judgment in the superior court of Wilkes county upon the coming down of the certificate therein, and this defendant prays the court to continue this cause until the coming down of said certificate, to the end that he may be enabled to properly plead as a defense that the questions and issues involved in this controversy have been so finally adjudicated and that the plaintiffs are estopped.

And this defendant denies all and all manner of unlawful combination and confederacy, wherewith he is by the said bill charged, without this, that there is any other matter, cause, or thing in the said plaintiffs' said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

A. C. AVERY,
T. J. DULA,
FINLEY & GREEN, *Attorneys.*

To the answers of the respondents the complainants filed replications in the usual form.

The following is a copy of the bond upon which this bill is filed:

Six Per Cent. Bond.

(Copy.)

The County of Wilkes, State of North Carolina, is indebted to the bearer in the sum of one thousand dollars, lawful money of the United States, payable on the first day of October, 1913, with interest thereon from the first day of October, A. D. 1889, at six per cent. per annum, payable on the first days of April and October in each year, at Wachovia National Bank of Winston, North Carolina, on presentation and surrender of the respective coupons hereto attached, as they severally become due and payable.

This bond is one of a series *on* one hundred bonds of the denomination of one thousand dollars each, issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, A. D. 1879, entitled "An act to amend the charter of the Northwestern North Carolina railroad for the construction of a second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county," and authorized by a vote of a majority of the qualified voters of Wilkes county, by an election regularly held for that purpose on the 6th day of November, A. D. 1888, and by an order of the Board of Commissioners of Wilkes County made on the first day of April, A. D. 1889. This series of bonds is issued to pay the subscription of one hundred thousand dollars made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes.

In witness whereof the chairman of the board of county
28 commissioners and the clerk of the said board have hereunto subscribed their names, and the said clerk has affixed the seal of said board of commissioners, this 1st day of October, A. D. 1889.

(Signed) R. W. COLVARD,
Ch'm'n Board of Commissioners of Wilkes Co.

(Signed) J. M. ADAMS,
[SEAL.] *Clerk Board Commissioners, Wilkes Co.*

The following is the ordinance of the convention of 1868, and also are the statutes, relied on by complainants as authority for the issuance of the bonds sued on :

CHAPTER 17.

An ordinance to incorporate the Northwestern North Carolina Railroad Company.

SECTION 1. Be it ordained by the people of North Carolina in convention assembled, and it is hereby ordained by authority of the same: That for the purpose of constructing a railroad of one or more tracks, from some point on the North Carolina railroad, between the town of Greensboro, in Guilford county, and the town of

Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the State, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of two millions of dollars, which shall have a corporate existence as a body politic, for the space of ninety-nine years, and by that name may sue and be sued, plead and be impleaded, in any court of law and equity in the State of North Carolina; and may have and use a common seal, and shall be capable in law and equity of purchasing, holding, leasing and conveying estates, real and personal, and mixed, and acquiring the same by gift or devise, so far as may be necessary for the objects herein contemplated, and no further; and said company may enjoy all other rights and immunities which other corporate bodies may lawfully exercise, and may make all necessary by-laws and regulations for its government not inconsistent with the constitution and laws of the State of North Carolina and of the United States.

SEC. 2. Be it further ordained, That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and co[illegible] in shares of one hundred dollars.

SEC. 3. Be it further o[illegible]ined, That books of subscription to the capital stock of said company shall be opened by the following commissioners, to wit: I. G. Lash, J. A. Vogler, H. W. Fries, in the town of Salem; and Thomas J. Wilson, Joseph Masten, R. A. Wilson, in the town of Winston, and by such other persons and in such other places as the aforesaid commissioners may direct; and that ten days' notice of the opening of said books shall be given in one or more newspapers of this State; and, furthermore, that the said commissioners, or any four of them, may, at any time after
29 said books have been kept open for the space of thirty days, and the sum of thirty thousand dollars has been subscribed to the capital stock of said company and five per cent. paid thereon, have power to call together the subscribers to said stock for the purpose of completing the organization of said company; and the said subscribers shall be and are hereby declared incorporated into a company by the name and style of the Northwestern North Carolina Railroad Company; and the said company may, from time to time, receive other subscriptions to its capital stock as it may deem proper.

SEC. 4. Be it further ordained, That the company may hold annual meetings of its stockholders, and oftener if necessary, and at its organization and the annual meetings subsequent thereto, ten directors shall be elected to hold office for one year, or until their successors shall be elected; and any of said meetings shall have power to make or alter the by-laws of the company: Provided, that in all of such meetings of the stockholders a majority of all the stock subscribed shall be represented in person or by proxy, which proxy shall be verified in the manner prescribed by the by-laws of the company; and each share thus represented shall be entitled to one vote on all questions; and that it shall be the duty of the

directors of the company to elect one of their own number as president of said company, and to fill all vacancies in their board.

SEC. 5. Be it further ordained, That after the organization of said company and the election of the president and other necessary officers, the officers so elected shall proceed, under the advice of the directors, to locate the eastern terminus of the Northwestern North Carolina railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem, in Forsyth county, which portion of said railroad, when completed, shall constitute its first division: Provided, that if the distance from the nearest section to the towns of Winston and Salem be less than five miles, the same shall be considered a section.

SEC. 6. Be it further ordained, That said company shall have the same power to call for and enforce the payment of stock subscribed as was heretofore granted to the North Carolina Railroad Company, by their charter of incorporation; and shall have power to condemn land for the use of the company, when a contract of purchase cannot be made with the owner thereof, to the same extent and in the same manner and under the same rules, regulations and restrictions as the said North Carolina Railroad Company were authorized to do by their act of incorporation.

SEC. 7. Be it further ordained, That all contracts made and entered into by the president or superintendent of the company, whether with or without seal, shall be binding upon the company; and the president shall, under the instruction of the board of directors, issue certificates of stock to the stockholders, which shall be transferable in the manner prescribed by the by-laws of the company.

SEC. 8. Be it further ordained, That whenever the president and chief engineer of said company shall certify to the governor of the State that the grading of any of the sections of said road, as mentioned in section 5 of the ordinance, is completed and ready for the superstructure, he shall direct the public treasurer of the State to loan in behalf of the State to the said company the sum of fifty thousand dollars in coupon bonds; and in like manner the governor will direct similar loans to be made to the company upon the completion of the grading of each and every section, until the first section is graded entire; and said company shall set aside the receipts of the road over and above its annual expenses, as a sinking fund to pay the said debts and interests, the whole amount of said debt and interest to be paid before the said company shall order any dividends on the stock of the company; and that said sinking fund so produced shall be semi-annually paid into the public treasury.

SEC. 9. Be it further ordained, That no part of said loan or bonds shall be delivered to said company until the president and directors thereof shall execute and deliver to the governor of the State a mortgage on the entire road and its property, conditioned to save the State harmless against the loss of both principal and interest of said loan.

SEC. 10. Be it further ordained, That the coupon bonds loaned, as aforesaid, shall be signed by the governor, countersigned by the treasurer and sealed with "the great seal of the State," bearing six per cent. interest, the principal payable at the end of thirty years from the date thereof, and the coupons for the interest payable semi-annually in such form as the public treasurer may direct.

SEC. 11. Be it further ordained, That the company may have the exclusive right of transporting persons and freight upon said
31 road at such rates of charges as the board of directors may fix, and may have power to farm or lease the same to any person or persons or corporation.

SEC. 12. Be it further ordained, That the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company.

SEC. 13. Be it further ordained, That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia.

SEC. 14. Be it further ordained, That this ordinance shall be in force from and after its passage.

Ratified this 9th day of March, A. D. 1868.

CALVIN J. COWLES, *President.*

T. A. BYRNES, *Secretary.*

EXHIBIT "B."

An act ratifying and confirming the charter of the Northwestern North Carolina Railroad Company.

SECTION 1. The General Assembly of North Carolina do enact that, an ordinance entitled "An ordinance to incorporate the Northwestern North Carolina Railroad Company," ratified the 9th day of March, A. D. 1868, be, and the same is hereby re-enacted, ratified and confirmed, and all acts and things heretofore done under the provisions of said ordinance are hereby ratified and confirmed.

SEC. 2. That all the rights, powers and authorities conferred or purporting to be conferred by said ordinance incorporating the Northwestern North Carolina Railroad Company on the justices of the peace of Forsyth county, or of the county court of said county be, and the same are hereby conferred on the commissioners of said county.

SEC. 3. That the commissioners of the county of Forsyth are hereby invested with full powers and authority to levy from
32 time to time, such tax as may be sufficient to pay the subscriptions made by said county to the capital stock of the

Northwestern North Carolina Railroad Company, and any interest due thereon, or to liquidate any debt created by said county in borrowing money to pay such subscription stock.

Ratified the 11th day of August, A. D. 1868.

Sections 1996 to 2000 of the code are as follows:

SEC. 1996. "The boards of commissioners *of the several counties shall have power to subscribe stock* to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest."

SEC. 1997. "The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and if a majority of the board shall vote for the proposition this shall be entered of record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And if a majority of the qualified voters of the county shall vote in favor of the proposition, *the board of county commissioners, through their chairman, shall have power to subscribe* the amount of stock proposed by them, and submit to the people, subject to all rules, regulations and restrictions of other stockholders in such company or companies: *Provided*, That the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper."

SEC. 1998. "All election- ordered under the preceding section shall be held by the sheriff under the laws and regulations provided for the election of members of the General Assembly. The votes shall be compared by *the boards of county commissioners*, who shall make a record of the same."

SEC. 1999. "In case *the county* shall subscribe the amount proposed in bonds, *the board of commissioners shall have power* to fix the rate of interest, not to exceed the rate of eight per cent., when the interest on said bonds shall be payable, and at what place, and shall also fix the time and places of paying the interest, and shall also determine the mode and manner of the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds."

SEC. 2000. "The taxes authorized by the three preceding sections to be raised for the payment of interest or principal shall be collected by the *sheriff in like manner as other State taxes*, and be paid into the hands of the county treasurer, to be used by the chairman of the board of county commissioners as directed by this chapter."

33 CHAPTER 43.

An act to amend the charter of the Northwestern North Carolina railroad for the construction of a second division from the town of Winston and Salem, in Forsyth county, up the Yadkin valley by Wilkesboro to Patterson's factory, Caldwell county.

The General Assembly of North Carolina do enact:

SECTION 1. That section thirteen of chapter seventeen of the ordinance of the convention of one thousand eight hundred and sixty-eight, ratified the ninth day of March, one thousand eight hundred and sixty-eight, be amended by adding the words " and one of which shall be constructed from the town of Winston and Salem, up the valley of the Yadkin by the way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory, in the county of Caldwell, which branch shall be known as second division."

SEC. 2. That said ordinance be amended by inserting a new section between sections thirteen and fourteen, to read as follows: "That the penitentiary board is authorized and directed to farm out to (the) president and directors of said company, for the purpose of constructing the second division of said road, two hundred able-bodied convicts to work on the construction of said railroad, but the said convicts shall be at all times under the supervision and control, as to their government and discipline, of a supervisor, who shall be appointed by the governor upon the recommendation of said railroad company; provided, that there shall be an estimate made of the net value of the labor done by said convicts on the road of said company to be fixed on a just and equitable basis by the president of said company and a person appointed by the governor on the part of the State, and the net value of labor shall be a first lien on all property and franchises of said second division of said railroad. Provided further, that the State shall not be at any expense for the feeding, clothing or other care of said convicts."

SEC. 3. Nothing in this act shall be construed to interfere with the convicts assigned to any road in which the State has an interest.

SEC. 4. That any township or city, town, county, or other
34 municipal corporation of this State shall have power and authority to subscribe for and take any number of shares of capital stock of said company that a majority of the voters of such township or city, town, county or other municipal corporation may elect to take therein. That upon (the) request of twenty resident- and tax-payers of any such township or city, town, county, or other municipal corporation of this State, the municipal corporation (and in case of township, the justices of the peace of such township) shall determine the number of shares in the said company proposed to be taken by such township or city, town, county or other municipal corporation, and shall appoint a day on which an election shall be held in such township or city, town, county, or other municipal corporation, in the manner prescribed by law for holding elections, at which election the legally qualified voters of such township or city, town, county, or other municipal corporation, shall be entitled to vote for or against such subscription, the

legally qualified voters favoring such subscription to vote ballots written or printed "railroad," those opposing such subscription to vote "no railroad." The election herein provided for shall be held at the usual voting places for such townships or cities, towns, counties, or other municipal corporations (and in case of townships, by justices of the peace of such townships), in the same manner that persons are appointed for holding other elections. And the returns thereof shall be made and the result thereof announced as in other elections prescribed by law. Provided, that in case of townships the justices of the peace of such township, for carrying out the purpose of this act, shall be vested with all the powers vested in the boards of commissioners and justices of the peace of counties as to the manner of appointing the persons to hold elections, and so forth, by law for the purpose of holding other elections, and townships shall have corporate powers for the purpose of this act. If the result of any such election shall show that a majority of the qualified voters of any township or city, town, county, or other municipal corporation, favor the taking of the amount of stock so voted for in such election, then the authorities who, by this act, are empowered to determine what amount of stock shall be taken shall subscribe the amount of stock so voted for in said company, and shall have power to levy and collect taxes for that special purpose to pay for the said stock in installments as the same may become due, or, in case it shall not be deemed best to collect taxes to pay by taxation such subscription for stock, then such township, or city, town, county or other municipal corporation, shall have power to issue bonds for the purpose of raising money to pay for such subscription, and shall provide for the payment of interest upon such bonds, and also for the payment of said bonds when they become due. Provided, however, that any township, county or other corporate authorities who shall issue any bonds or issue any obligations in behalf of this road shall be required to commence as soon as said obligations are assumed to provide a sinking fund that shall be sufficient to liquidate said bonds or obligations at maturity; provided further, that nothing in this charter shall be construed to exempt said railroad from taxation.

SEC. 5. That this act shall be in force from and after its ratification.

Read three times in the General Assembly and ratified the 20th day of February, A. D. 1879.

An act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof.

The General Assembly of North Carolina do enact:

SECTION 1. That it shall be lawful for the Northwestern North Carolina Railroad Company to extend and construct its line of road, or a branch thereof, to commence at or near Winston, in the county of Forsyth, through the counties of Forsyth, Davidson, Yadkin, Davie, Rowan and Iredell, or any or either of them, to Statesville, or some other point on the Western North Carolina railroad, and may build and operate additional branches thereto, or from its

present main line to any important mines or manufactories in any of said counties, or counties adjacent to them; provided, that nothing contained in this act shall operate to be construed so as to prevent or interfere with the construction of the North Carolina extension of the Virginia Midland railroad from Danville, Virginia, via Winston, Forsyth county, and Mocksville, Davie county, to some point on the Atlantic, Tennessee, and Ohio railroad in Iredell county; but said company is hereby authorized to build said road under the organization and consolidation heretofore made by the stockholders and directors of the consolidated line composing the North Carolina extension.

SEC. 2. That to provide the means in whole or in part for this purpose, the said company may receive subscriptions in money, labor, property, or otherwise, as the said company may agree, and may mortgage or otherwise pledge its property and franchises and the work constructed, or to be constructed, with the franchises and rights connected therewith.

SEC. 3. That any corporation, county, city, town or township interested therein, may subscribe to stock for said purpose, or otherwise contribute to such work in such manner and in such amount as shall be determined by the proper authorities of such corporation, county, city, town, or township, and agreed on with the said Northwestern North Carolina Railroad Company.

SEC. 4. This act shall be in force from and after its ratification.

In the General Assembly, read three times and ratified this the 2nd day of March, A. D. 1881.

36 The following are the material and pertinent sections of the act of 1852 referred to in the ordinance of 1868, the charter of the North Western North Carolina Railroad Company:

Chapter 136 of the Laws of North Carolina, session 1852.

SEC. 33. Be it further enacted That it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided.

SEC. 34. Be it further enacted That the corporate authorities of such town, of the justices of the peace of such county, a majority of the justices of the county concurring, to make an order requiring the constable of such town and the sheriff of such county, at such time and on such notice as they shall direct, to open a poll and take the sense of the voters of such town qualified to vote for town officers, and of the voters of such county qualified to vote for members of the house of commons of the General Assembly, whether the officers of said town and the justices of the peace of said county shall subscribe to the stock of such company for such sum as the order shall propose, and the constable shall make return of the number against it, and the sheriff shall, in like manner, make return as to the vote in his county to the first court thereafter, to be

held for such county and it shall be the duty of the sheriff to notify each justice of said county to attend at the court-house to which he may make his returns of said poll.

SEC. 35. Be it further enacted That if upon the return of such constable and of such sheriff it shall appear that a majority of the qualified voters of such town, and by the return of the sheriff that a majority of the qualified voters of such county voting upon the question are in favor of the subscription, the corporate authorities of such town and the justices of such county shall appoint an agent to make the subscription in behalf of such town and county, to be paid for in the bonds of such town and county, and on such time as shall be agreed on by said town officers and the justices of such county.

SEC. 36. Be it further enacted That for the purpose of paying the quotas on said stock as may be called for or the installments of such subscriptions as may fall due, the town authorities and the justices of the county shall have power to appoint an agent or agents to negotiate a loan or loans for and in the name of such town and county; and it shall be the duty of the authorities of such town and the justices of such county to levy such taxes annually on the persons, lands and other personal property within such town and county as may be sufficient to pay the amount of such loan or loans and the interest thereon, and as said town authorities and the justices of such county shall deem necessary and proper, and to make such order or orders as shall be deemed necessary for the due collection and payment of the same; and the stock subscribed on behalf of such town and county shall stand pledged for the payment of the loan thus authorized to be contracted.

SEC. 37. Be it further enacted, That the right to the stock in the company hereby authorized to be subscribed, shall vest in the town and county making such subscriptions; and the corporate authorities of said town and the justices of such county shall have power from time to time to appoint a proxy to represent the stock in the meeting of the stockholders of the company, and also an agent to collect the dividends of such stock, and when collected, to apply the same to payment of the bonds and interest negotiated as aforesaid.

38 *Agreement of Counsel as to Record and Opinion.*

Circuit Court of the United States, Western District of North Carolina, Fourth Circuit. In Equity.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and J. H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Appellants,
vs.
W. N. COLER AND COMPANY, Appellees.

Agreement of Counsel.

Counsel for the complainants, Coler and Company, having offered in evidence on the hearing the printed transcript of record lately filed in the Supreme Court of the United States, in the case of J. M. Turner and J. M. Welburn, plaintiffs in error, *versus* The Board of Commissioners of Wilkes County, to show a discrepancy in the language of the opinion of the court sent up as a part of said record, and the opinion of the court as published in the North Carolina Reports, — is now agreed by counsel that the following language appears in said opinion as printed in said transcript of record, to wit:

"Enough appears to indicate, what is common knowledge, that the railroad does not touch the county of Wilkes, and that the stock for which these bonds were issued has been swept away in the maealsstrom of corporate reorganization," and that in lieu of said language the following sentence is substituted in the opinion of the court in said action, as published on page 326 of volume 123 of the N. C. Report-, to wit:

"Enough appears to indicate, what is common knowledge, that the stock for which these bonds were issued has been swept away in the maealstrom of corporate reorganization."

It is further agreed by counsel to constitute a part of the record on appeal in the above-entitled cause:

1st. That an action was brought by J. M. Turner, E. Wallace and other-, tax-payers of Wilkes county, *versus* The Richmond and Danville Railroad Company, The Northwestern North Carolina Railroad Company and The Board of Commissioners of Wilkes County, returnable to the fall term of the superior court of Wilkes county, A. D. 1893, for the purpose of compelling defendants by mandamus to build and construct the Northwestern North Carolina railroad across the Yadkin river from North Wilkesboro to Wilkesboro, a distance of about one mile, and that the plaintiffs in said action submitted to judgment of nonsuit which was rendered at the fall term 1895, of said superior court.

2nd. It is further admitted and agreed between counsel that it may appear as a part of the record on appeal that an action was brought by Jessie M. Douglas and others as plaintiffs against The Northwestern North Carolina Railroad Company and others as defendants, returnable to the superior court of Guilford county at the June term, 1888, for the purpose of preventing and restraining the Northwestern North Carolina Railroad Company from issuing

mortgage bonds constituting a lien upon the completed road of said company to *and* in the extension of its line.

3rd. That when the franchise and property of the Northwestern North Carolina Railroad Company was offered for sale under a decree of foreclosure made by the circuit court of the United States by the special master named in said decree at Winston, in the year 1894, R. M. Douglas, the justice who delivered the opinion of the court contained in said transcript, was present and for and on behalf of his wife, as a stockholder, forbade said sale in writing, and appeared before the circuit judge and opposed the granting of the decree confirming said sale.

It is agreed that the certified extracts from the journals of the legislative house of North Carolina, contained in the record of the proceedings in the superior court of Wilkes county and in the supreme court of North Carolina, filed as an exhibit to the supplemental answer, present a correct history of legislative action in reference to the amendments to the charter of the Northwestern North Carolina Railroad Company, ratified, respectively, at the
39 sessions of said legislature in 1879 and 1881, and that the copies of said legislative proceedings offered at the hearing need not be sent up, except the extracts from the journals of the house of representatives at the special session of 1868, in reference to the private act ratified August 11th, 1868, which, with the other said amendments is filed as an exhibit to the complaint.

It is further agreed that the opinion of Judge Purnell as published in the Federal Reporter (volume 90) filed in Union Bank *vs.* Town of Oxford and which is to be adopted as the opinion in this case, need not be sent up as a part of the record.

It is further agreed, that the affidavits contained in the exhibit filed with the supplemental answer be considered as offered at the hearing.

CHAS. PRICE,
Sol. — Complain'ts.
A. C. AVERY,
Sol. for Respondents.

Transcript of Journals—Senate and House.

HOUSE OF REPRESENTATIVES,
TUESDAY, *January 14th*, 1879.

By Mr. York, a bill to amend the charter of the Northwestern North Carolina Railroad Company for the construction of a second division from Winston and Salem, Forsyth county, up the Yadkin River valley by Wilkesboro to Patterson, Caldwell county.

Referred to the committee on railroads, post-roads, etc.

HOUSE OF REPRESENTATIVES,
SATURDAY, *January 18th*, 1879.

Mr. Vaughan, from the committee on railroads, post-roads, etc., reports on H. B. 103, a bill to amend the charter of the Northwestern North Carolina railroad, for the construction of a second divison

from the towns of Salem and Winston, Forsyth county, up the valley of the Yadkin river, by Wilkesboro to Patterson, Caldwell county, recommending its passage, with the adoption of an accompanying amendment.

HOUSE OF REPRESENTATIVES,
MONDAY, *January 20th*, 1879.

On motion of Mr. York,

H. B. 103, a bill to amend the charter of the Northwestern North Carolina railroad, W. C. R. R., for the construction of a second division from Winston, Forsyth county, up the Yadkin valley, by Wilkesboro to Patterson, in Caldwell county, is taken up for consideration.

The question is on the amendment suggested by the committee, and it is adopted; and as amended, the bill passes its second reading; and then, on motion of Mr. York, is referred to the committee on internal improvements, with order to be printed, and it is ordered by the house.

HOUSE OF REPRESENTATIVES,
THURSDAY, *January 30th*, 1879.

Mr. York, on the part of the committee of internal improvements, submits the following reports on —; and,

40 H. B. 103, a bill to amend the charter of the Northwestern North Carolina railroad, etc., recommending its passage with amendments proposed.

HOUSE OF REPRESENTATIVES,
SATURDAY, *February* 1, 1879.

H. B. 103, an act to amend the charter of the Northwestern North Carolina railroad, etc., is taken up on its third reading.

Mr. York submits a new section to be added to the bill by way of amendment, which is accepted.

Mr. Richardson submits the following amendments, which is accepted:

"Provided, that nothing in this charter shall be construed to exempt said road from taxation."

Mr. Carter, of Buncombe, submits an amendment, which, after discussion, is withdrawn.

The question is then put on the amendments offered by the committee, and they are accepted; and the question recurs on the passage of the bill.

Mr. Powers sends forward the following amendment:

Amend by inserting in the proper place, "Provided, however, that any county, township, or other corporate authorities who shall issue any bonds or assume any obligations in behalf of this road shall be required to commence as soon as said obligations are assumed, to provide a sinking fund that shall be sufficient to liquidate said bonds or obligations at maturity."

Mr. Christmas sends forward the following amendment:

"Strike out in line 6 the words, 'a person' and insert 'two persons in the eastern part of the State and one in the western part;'

and insert in line 17 between the words 'toll' and 'who are not in any respect interested in said work.'"

The question is put on the amendment, and it is rejected.

Mr. Turner sends the following amendment:

Strike out "convict and convict labor wherever it occurs in the bill."

The question is put on this amendment and it is rejected; and the question recurs on the passage of the bill; and it passes by the following vote, and is ordered to be engrossed and transmitted to the senate:

Ayes—Messrs. Amis, Anderson, Angier, Ardrey, Armstrong, Bateman, Burhod, Bingham, Bizzell, Blocker, Bonner, Bost, Brown
41 of Yadkin, Brison, Buchan, Cale, Carter of Buncombe, Carter of Yancey, Carrol, Carson, Clark, Colwell, Council, Covington, Davis of Haywood, Deans, Dickson, Dunn, Ellison, English, Etheridge, Ferrell, Foard, Foster, Fulcher, Goldston, Grant, Harrill, Harrison, Hewett, Hines, Holt, Jones, Johnson of Davie, Lamb, Leatherwood, Lockhart, Lowrie, Lutterlow, Meares, Miller, McLean, Normant, Oliver, Orchard, Packston, Pettipher, Powers, Rawley, Reed of Macon, Richardson of Columbus, Robertson, Smith, Taylor, Turner, Venable, Wheeler, Wimberley, York, Young—total ayes, 72.

Nays—Carter of Warren, Christmas, Henderson, Horton, Osborne, Wynne—nays, 6.

HOUSE OF REPRESENTATIVES,
THURSDAY, *February 20th*, 1879.

The committee on enrolled bills reports as correctly enrolled:

An act to amend the charter of the Northwestern North Carolina railroad, and for the construction of a second division from the towns of Winston and Salem, Forsyth county, up to the Yadkin valley to and by Wilkesboro, Patterson's factory, Caldwell county.

SENATE CHAMBER, *February 4th*, 1879.

A message was received from the house, —, transmitting for concurrence:

H. B. No. 103, S. B. No. 378, bill to amend the charter of the Northwestern North Carolina railroad for the construction of a division from the towns of Salem and Winston, up the Yadkin valley by Wilkesboro, to Patterson's factory, in Caldwell county.

Referred to the committee on internal improvements.

SENATE CHAMBER, *February 11th*, 1879.

From the committee on internal improvements:

By Mr. Brower, H. B. No. 103, S. B. No. 378, bill to amend the charter of the Northwestern North Carolina railroad, for the construction of a second division from the towns of Winston and Salem, Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county, recommending it do pass.

On motion of Mr. Nicholson, H. B. No. 103, S. B. 378, bill to amend the charter of the Northwestern North Carolina railroad for the construction of a second division from the towns of Winston and Salem, Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, in Caldwell county, was taken up on its second reading as passed—ayes 33, noes 5, as follows:

Those voting in the affirmative were:

Messrs. Alston, Black, Bledsoe, Brower, Bryan of Duplin, Bryan of Pender, Bull, Caldwell, Dancey, Davidson, Dortch, Eppes, Graham of Lincoln, Graham of Montgomery, Harriss, Henderson, Holleman, Hoyle, Leach, Lyon, Matheson, Merritt, Mitchell, Moye, Nicholson, Ormand, Redwine, Ross, Scales, Stuart, Taylor, Wardwell, Ward—33.

Those voting in the negative were:

Messrs. Alexander, Austin, King, Mebane, Williamson—5.

SENATE CHAMBER, *February 12th*, 1879.

H. B. No. 103, S. B. No. 378, bill to amend the charter of the Northwestern North Carolina railroad for the construction of a second division for the towns of Winston and Salem, in Forsyth county, up the Yadkin valley by Wilkesboro to Patterson's factory, in Caldwell county, passed its third reading—ayes 35, noes 1, as follows:

Those voting in the affirmative were:

Messrs. Alston, Bledsoe, Brower, Bryan of Duplin, Bryan of Pender, Bull, Bynum, Caldwell, Dancey, Dortch, Eaves, Eppes, Erwin, Everett, Graham of Lincoln, Harris, Henderson, Holleman, Hoyle, King, Leach, Lyon, Matherson, Mitchell, Nicholson, Ormand, Redwine, Respass, Rose, Scales, Stuart, Taylor, Waddell, Waldo, Ward—35.

Mr. Williamson voted in the negative.

SENATE CHAMBER, *February 20th*, 1879.

The committee on enrolled bills reported as correctly enrolled:

H. B. 103, S. B. 378, an act to amend the charter of the Northwestern North Carolina railroad, and for the construction of a second division from the towns of Salem and Winston, Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county.

43 SENATE CHAMBER, *January 21st*, 1881.

Bills and resolutions were introduced, read the first time, and disposed of as follows:

By Mr. Tucker, S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its railroad, and to build branches thereof.

Referred to the committee on internal improvements.

Senate Journal.

JANUARY, 25TH, 1881.

From the committee on internal improvements:

By Mr. York, S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road, and to build branches thereof, recommending it do pass.

Calendar.

Senate Journal.

JANUARY 29TH, 1881.

Bills and resolutions upon the calendar were taken up and disposed of as follows:

S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road, and to build branches thereof.

On its second reading, Mr. Scott, of New Hanover, moves the bill be postponed until Thursday next. Lost.

Bill then passed its second reading—ayes 26, noes — as follows:

Those voting in the affirmative were:

Messrs. Bernard, Burwell, Carr, Cunningham, Davidson, Dever, Dickey, Dortch, Eaves, Finger, Hanes, Hooper, Jenkins, Jones, King, Lockhart, Mebane, Newland, Oats, Pridgen, Richardson, Scott of New Hanover, Shears, Staples, Pucker, York—26.

The Calendar.

SENATE CHAMBER, *February 5th*, 1881.

S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road and to build branches thereof, on its third reading.

Mr. Glenn moves to amend:

Add to the first section the following: "Provided that
44 nothing contained in this act shall operate or be construed so as to prevent or interfere with the construction of the North Carolina extension of the Virginia Midland railroad from Danville, Virginia, via Winston, Forsyth county, and Mocksville, Davie county, to some point on the Atlantic, Tennessee and Ohio railroad, in Iredell county: but said company is hereby authorized to build said railroad under the organization and consolidation heretofore made by the stockholders and directors of the consolidated line, comprising the North Carolina extension."

Mr. Tucker moves to amend the amendment:

"Strike out all after the words 'Iredell county' in line 12." Lost.

Mr. Glenn's amendment was adopted.

Bill then passed its third reading, ayes 34, as follows:

Messrs. Battle, Blue, Burwell, Carr, Davidson, Dickey, Dortch, Faison, Finger, Foil, Glenn, Gudger, Hampton, Hanes, Harper, Harris, Jenkins, Jones, Manning, Mebane, Merritt, Newsom, Oats, Parish, Richardson, Scott of New Hanover, Scott of Rockingham,

Spears, Spruill, Stowe, Tucker, Whitaker, Williamson of Davie and Wynne—34.

SENATE CHAMBER, *February* 11*th*, 1881.

From the committee on engrossed bills:

By Mr. Spears, S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereto.

SENATE CHAMBER, *March* 2, 1881.

From the committee on enrolled bills:

S. B. 224, H. B. 634, an act to authorize the Northwestern North Carolina Railroad Company to extend its road and build branches thereof.

HOUSE OF REPRESENTATIVES,
FRIDAY, *February* 11*th*, 1881.

A message from the senate is announced, transmitting S. B. 224, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereof.

S. B. 224 is referred to the committee on corporations.

HOUSE OF REPRESENTATIVES,
SATURDAY, *February* 12*th*, 1881.

45 *Reports of Committees.*

—— favorably on ——; and S. B. 224, H. B. 634, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereto.

HOUSE OF REPRESENTATIVES,
MONDAY, *February* 21*st*, 1881.

S. B. 224, H. B. 634, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereto.

HOUSE OF REPRESENTATIVES,
TUESDAY, *February* 22, 1881.

The morning hour having expired, on motion of Mr. Carter, the vote by which S. B. 224, H. B. 634, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereof, is reconsidered; and the bill is placed on the calendar.

HOUSE OF REPRESENTATIVES,
THURSDAY, *February* 24*th*, 1881.

The calendar is taken up, and

S. B. 224, H. B. 634, a bill to authorize the North Western North Carolina railroad to extend its road and build branches, is put on its third reading.

Mr. Carter offers the following amendment:

Amend by adding to section 3 the following words: "Provided, that nothing in this act contained shall be construed to authorize

or empower the Western North Carolina Railroad Company to lend its credit, or otherwise in any manner contribute to the work or any part thereof contemplated in this act."

The amendment is adopted; and as amended, the bill passes its third reading, and is ordered to be sent to the senate with engrossed amendments.

HOUSE OF REPRESENTATIVES,
WEDNESDAY, *March 2d*, 1881.

Mr. Green of Orange, from the committee on enrolled bills, reports the following bill to have been correctly enrolled: An act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof.

46 *Certificate of Secretary of State.*

NORTH CAROLINA,
Department of State.

RALEIGH, N. C., *January 15th*, 1897.

I, Cyrus Thompson, secretary of state, do hereby certify that the foregoing and annexed nine sheets contain a full and accurate transcript of the journals of the senate and house of representatives of the State of North Carolina, for the session of the General Assembly in the year 1879, of so much of said journal as relates to H. B. 103, S. B. 378, a bill to be entitled An act to amend the charter of the Northwestern North Carolina railroad, and for the construction of a second division from the towns of Winston and Salem, Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county, the title, as published, of chapter 43, Public Laws of the Session of 1879; and of so much of the journals of senate and house of representatives of the State of North Carolina, for the session of the General Assembly in the year 1881, as relates to S. B. 224, H. B. 634, a bill to be entitled An act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof, the title, as published, of chapter 162 of Public Laws of the Session of 1881.

Done in office at Raleigh, this the 15th day of January, A. D. 1897.

[SEAL.] CYRUS THOMPSON,
Secretary of State.

Extracts from Journal of House of Representatives, Filed as Exhibit to Bill of Complaint.

The following extracts from the journal of the house of representatives of the General Assembly of North Carolina were offered with the entire printed journal, to show that the act of August 11, 1868, which is one of the exhibits attached to the bill of complaint, failed to pass in the manner prescribed by the constitution of North Carolina, article 2, section 14:

"A message was received from the senate concurring in the amendment to the bill in relation to marriage licenses."... .....
....
"Also a message transmitting a bill ratifying and confirming the charter of the Northwestern North Carolina Railroad Company."..
....
"On motion of Mr. Vest, the senate bill to ratify the charter of the Northwestern North Carolina Railroad Company was taken up, and referred to the finance committee."..... ....
... ...
"The senate bill to ratify the charter of the Northwestern North Carolina Railroad Company passed its final reading."... .....
....
"Mr. Rhodes, from the committee on enrolled bills, reported as correctly enrolled the following, which were signed by the speaker and transmitted to the senate:
"A bill ratifying the charter of the Northwestern North Carolina Railroad Company."
The foregoing were the only entries in reference to the passage of the said act contained in the official printed journal, and it was not denied that it failed to pass in accordance with art. 2, sec. 14.

Endorsed: Filed in this office, April 17, 1890. Sam'l L. Trogdon, clerk.

47 United States Circuit Court, Western District of North Carolina, Greensboro, N. C., April 13th, 1890. In Equity.

W. N. COLER AND COMPANY, Complainants,
vs.
THE BOARD OF COMMISSIONERS OF WILKES CO. and Clarence Call, ex-Sheriff and *ex Officio* ex-Treasurer, and John H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Respondents. } Final Decree.

This cause coming on to be heard upon the bill, answers, replications and former orders, exhibits and other evidence in the cause, and being debated by counsel, the court doth declare: that the bonds issued by the county of Wilkes in aid of the building of the Northwestern North Carolina railroad, mentioned in the bill, are valid obligations of the county of Wilkes, and were purchased by the complainants for value, and that they are the lawful holders of the same. The court doth further declare that the respondents, Clarence Call, ex-sheriff and *ex officio* ex-treasurer, and John H. Johnson, sheriff and *ex officio* treasurer of Wilkes county, are the lawful trustees of the said bondholders, and hold the sum of thirteen thousand dollars, $13,000, mentioned in the bill as such trustees, under and by virtue of the law and orders of the Board of Commissioners of Wilkes County, for the benefit of said bondholders, and for the sole purpose of paying off and discharging the interest due on the said bonds, as set out in the bill. And now it is therefore ordered and decreed that Kerr Craige be, and is, appointed a receiver

for said sum of thirteen thousand dollars; and that the said Call and Johnson, ex-treasurer and treasurer, as aforesaid, pay over to him forthwith the said sum or any such part of the same as may be in their hands, and that the said Board of Commissioners of Wilkes County are enjoined from in any manner interfering with the execution and performance of this decree. It is further ordered and decreed that the said receiver, Kerr Craige, enter into bond in the sum of twenty thousand dollars, the same to be approved by this court, for the faithful performance of the duties of his receivership.

It is further ordered and decreed that the said receiver hold the said sum of thirteen thousand dollars until the further order of this court.

It is further ordered and decreed that the clerk of this court certify this decree to the said receiver and to the respondents, to wit: The Board of Commissioners of Wilkes County, and the said ex-treasurer and treasurer, Call and Johnson.

THOS. R. PURNELL,
United States Dist. Judge, Presiding in the Circuit Court of the Western Dist. of N. C., by Designation of the Circuit Judge of this the 4th Circuit of the United States and Sec. 906, R. S.

Endorsed: Filed in this office, Apr. 14th, 1899. Sam'l L. Trogdon, clerk.

48 Upon the hearing on the circuit, the decree as above set out was entered in favor of the complainants. Whereupon the suit was taken by appeal to this the circuit court of appeals for the fourth circuit before the undersigned, and said court desiring for its proper decision the instruction of the Supreme Court of the United States concerning certain questions or propositions of law arising in said suit:

Now, therefore, we, the undersigned, do hereby certify said questions or propositions of law to the Supreme Court of the United States for instruction, as aforesaid:

First. Whether, upon the averments of the bill of complaint, answers, replications, orders, exhibits, and other evidence, and matters and things recited herein, the circuit court of the United States was bound in passing upon this case by the decisions of the supreme court of North Carolina in the following cases:

Commissioners of Wilkes County *vs.* Clarence Call *et al.*, 123 North Carolina Report, 308;
Bank *vs.* Commissioners, 119 N. C. Rep., 214;
Commissioners *vs.* Snuggs, 121 N. C. Rep., 394;
Radman *vs.* Washington, 122 N. C. Rep., 39;
Commissioners *vs.* Payne, 123 N. C. Rep., 432;

considered in connection with prior decisions of said court and the following provisions of the constitution of said State:

Article 2, sections 14 and 16, and article 5, sections 1, 4, 6, and 7, and article 7, section 7.

49 Second. Whether, if the bonds and coupons in question were issued, put in circulation, and came to the hands of complainants, appellees, in due course of trade, for valuable consideration and without notice, and if there were at that time no decision of the supreme court of North Carolina adverse to these bonds or identical bonds issued under similar statutes, the bonds held by complainants are valid bonds.

Third. Whether there was any decision adverse to the validity of these bonds or identical bonds or any construction of the constitution or law of North Carolina which affected the question of their validity when they came in due course of trade and for valuable consideration and without notice other than such notice as the parties are assumed to have of existing provisions in the constitution and statutes of the State of their invalidity.

50 As witness our hands this 17th day of November, A. D. 1899.

CHARLES H. SIMONTON,
Circuit Judge Presiding, Fourth Circuit.
JOHN PAUL,
District Judge, Western District of Virginia.
WM. H. BRAWLEY,
District Judge, District of South Carolina.

Clerk's Certificate.

UNITED STATES OF AMERICA:

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the aforegoing is a true copy of the original certificate of questions or propositions of law to the Supreme Court of the United States in the therein-entitled cause filed and now remaining of record in the said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fourth Circuit.

In testimony whereof I hereto set my hand and affix the seal of the United States circuit court of appeals for the fourth circuit, at Richmond, on this 5th day of December, A. D. 1899.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th C't.

Endorsed on cover: File No., 17,585. U. S. C. C. of appeals, 4th circuit. Term No., 471. The Board of Commissioners of Wilkes County *et al.*, appellants, *vs.* W. N. Coler & Company. (Certificate.) Filed December 15th, 1899.

A/A 471 JAN 9425

UNITED STATES OF AMERICA.

Notice of motion to advance.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

Filed Jan. 13, 1900.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND OTHERS, *Appellants*,

Versus

W. N. COLAR AND COMPANY, *Appellees*.

To the Hon. Charles Price, Attorney for the Appellees:

You are hereby notified that on Monday, February 5th, A. D. 1900, or as soon thereafter as it can be heard, a motion will be made in the Supreme Court of the United States, in the cause entitled Commissioners of Wilkes County and Others *versus* W. N. Colar and Company:

1st. To advance the hearing of the said cause, for the reasons that it involves questions of public interest, and as to which there has been a conflict between the rulings of the Supreme Court of the State of North Carolina and the Federal Court of the two circuits embracing said State.

2nd. To allow the counsel for the Commissioners of Stanley County in a cause wherein the mandate has been held, after a decision favorable to said Commissioners, to await the opinion of the Supreme Court of the United States upon questions submitted for instruction in the above entitled cause, and to allow further time, or extend the time for the hearing beyond that prescribed by the rules of the Court for the benefit of said counsel.

A. C. AVERY,
Attorney for Appellants.

Dated January 12th, A. D. 1900. Service accepted this the 13th day of January, A. D. 1900.

CHARLES PRICE.

No. xxx 167

JAMES I 19426

Motion to Advance &c. 471

UNITED STATES OF AMERICA.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

Filed Jan. 13, 1900.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND OTHERS, *Appellants*,

Versus

W. N. COLAR AND COMPANY, *Appellees*.

Come now the appellants, by their counsel appearing in that behalf, and move the Court:

1st. To advance the hearing of the said cause, for the reasons that it involves questions of public interest, and as to which there has been a conflict between the rulings of the Supreme Court of the State of North Carolina and the Federal Court of the two circuits embracing said State.

2nd. To allow the counsel for the Commissioners of Stanley County in a cause wherein the mandate has been held, after a decision favorable to said Commissioners, to await the opinion of the Supreme Court of the United States upon questions submitted for instruction in the above entitled cause, and to allow further time, or extend the time for the hearing beyond that prescribed by the rules of the Court for the benefit of said counsel.

A. C. AVERY,
Counsel for Appellants.

Filed Jan. 23, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 471.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND OTHERS, APPELLANTS,

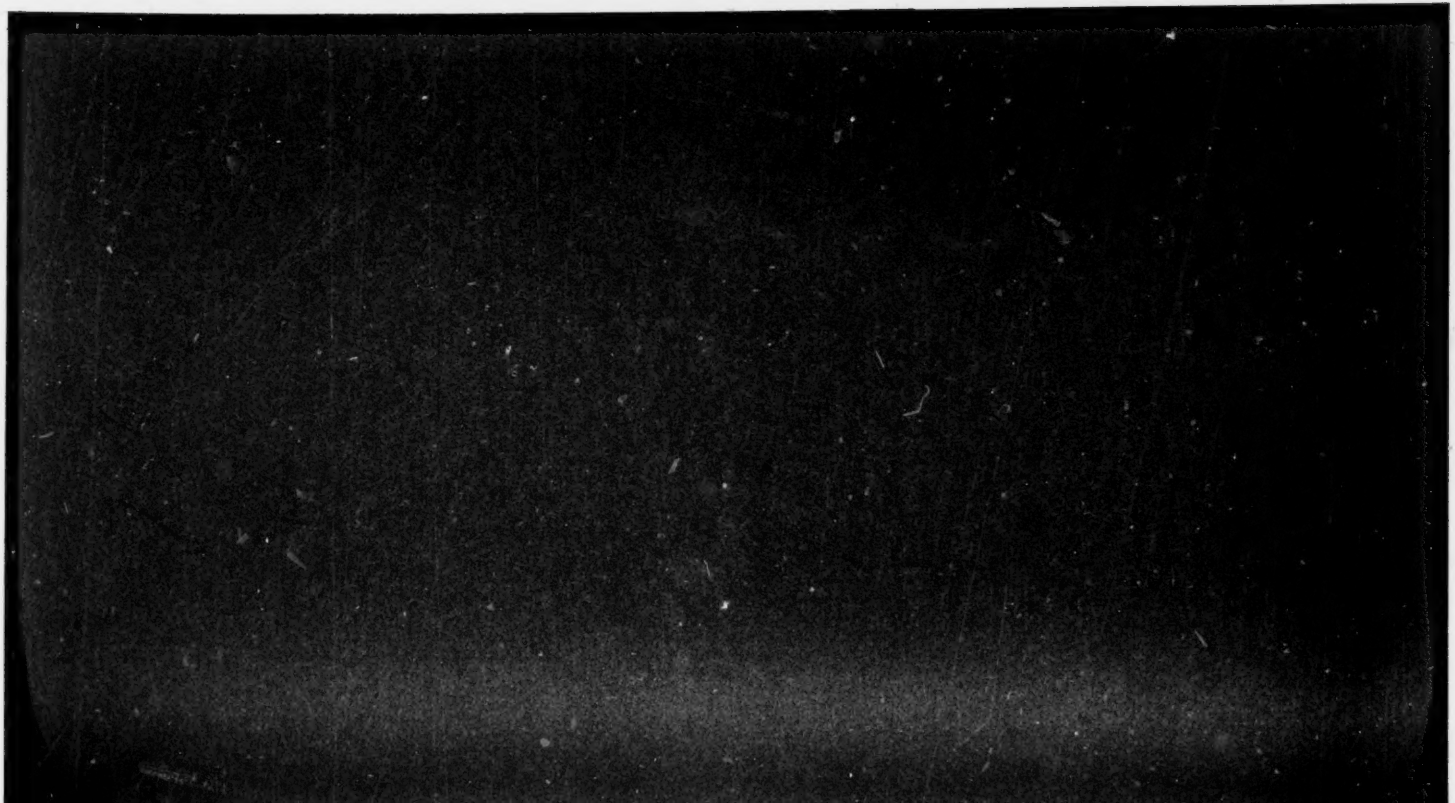
vs.

W. H. COLER AND COMPANY.

BRIEF IN SUPPORT OF MOTIONS TO ADVANCE AND EXTEND TIME FOR ARGUMENT.

A. C. AVERY,
Counsel for Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-23-1900



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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 471.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND OTHERS, APPELLANTS,

vs.

W. N. COLER AND COMPANY, APPELLEES.

Brief of A. C. Avery, Solicitor for Appellants, in Support of Motions to Advance and Extend Time for Hearing.

FACTS RELIED ON IN SUPPORT OF MOTIONS.

This is one of four suits in equity and actions at law now pending in the Federal courts and involving the question whether four decisions of the supreme court of North Carolina, construing the constitution and laws of that State in their bearing upon the validity of municipal bonds, were erroneous and should be disregarded by the Federal tribunals. In two of these causes, Commissioners of Stanley *vs.* Coler and Commissioners of Oxford *vs.* Bank, opinions were filed in the United States circuit court of appeals, fourth

circuit, by Judge Goff, overruling in the first case an opinion of Judge Simonton in the circuit court, and in the second case overruling an opinion of Judge Purnell. The two last-named judges had refused to follow the opinions of the supreme court of North Carolina. The opinion filed in the United States circuit court of appeals followed the decisions of the State court in the two causes mentioned, and which depended upon questions substantially the same as those certified to the supreme court in the case at bar. The United States circuit court of appeals for the fourth circuit, being differently constituted at the November term, 1899, certified to this court the questions submitted in this cause, and ordered that mandates should not be issued to the circuit court, either in Commissioners of Stanley *vs.* Coler or Commissioners of Oxford *vs.* Bank, until the questions certified in this case should have been answered. Judge Simonton, who presided over the United States circuit court of appeals for the fourth circuit, at the November term, 1899, had filed an opinion in the circuit court and had refused to follow the decision of the supreme court of North Carolina, and had been followed by Judge Thomas R. Purnell for the eastern district of North Carolina in his ruling both in Commissioners of Oxford *vs.* Bank and in the case at bar when it was heard in the circuit court at Greensboro.

Substantially the same questions are involved in an action at law brought in the circuit court for the western district of North Carolina, at Asheville, to enforce the collection of past-due coupons upon bonds of the county of Buncombe which have been declared invalid by the supreme court of North Carolina. The trial of this action has also been postponed to await the response to the questions certified in this cause.

The four decisions of the supreme court of North Carolina, which it is contended the Federal courts are not bound to follow, are the following:

Bank *vs.* Commissioners, 119 N. C., 214.
Commissioners *vs.* Snuggs, 121 N. C., 394.
Commissioners *vs.* Call, 123 N. C., 308.
Commissioners *vs.* Payne, 123 N. C., 432.

Such an unfortunate, if not unseemly, conflict between the State and Federal tribunals should be settled as speedily as possible, and it seems to the appellants that the Supreme Court of the United States should depart from the letter of the rules governing its procedure to put an end to such a conflict without regard to the magnitude of the interest involved, viewed from a financial standpoint.

The appellants are of the opinion that the facts set forth above bring this cause within the exception of rule 26, subsection 7, by showing "special and peculiar circumstances." While the questions certified in this case are left open, any judge who may hold a circuit court in either of the districts of North Carolina would be left at liberty either to follow or disregard the decisions of the highest court of the State, which have already been cited. A very unusual state of affairs is presented when the judges of the circuit court of the United States are so long left at liberty to restrain the local agencies of the State from obeying the law as interpreted by the highest tribunal of the State. For two years circuit and district judges, in disregard of State decisions, have been restraining municipal authorities from expending certain funds in a manner declared lawful by their own highest court. Such a state of uncertainty as to what is the law of the land is to be deplored because it embarrasses governmental agencies in the discharge of their duties. But this case appears more clearly to present "special and peculiar circumstances" when we consider the fact that they affect the validity of a class of securities offered upon the market as negotiable, which are declared by the State courts to be void because issued without such authority as is declared essential by mandatory requirement of the State constitution, while subordinate Federal tribunals are invit-

ing investment in these securities by holding that the decisions of the State court are in violation of the Constitution of the United States.

As the reason for advancing the hearing in this case, the appellants submit that the action of the United States circuit court of appeals in certifying these questions, which had been passed upon by that court at the term immediately preceding, shows that the court was impressed with the very great importance of a speedy adjudication by the court of last resort for the reasons already stated.

A. C. AVERY,
Solicitor for Appellants.

Office Supreme Court, U. S.
FILED
FEB 5 1900
JAMES H. McKENNEY,
Clerk.

No. XXX. 167

471

Brf. of Shepherd for Appts. (one)

UNITED STATES OF AMERICA,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

Filed Feb. 5, 1900.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND OTHERS, *Appellants*,

versus

W. N. COLAR & COMPANY.

Brief in Behalf of Board of Commissioners of Stanly County.

The Board of Commissioners of Stanly County were sued by W. N. Colar & Co. (the appellees in the above entitled [illegible]) in the Circuit Court of the United States for Western North Carolina. The suit involved the validity of bonds issued by the county to the amount of $100,000.00, and it having been carried to the Circuit Court of Appeals a decision was there rendered reversing the judgment of the Circuit Judge and declaring that the act of the Legislature under which said bonds were issued was void, it not having been passed according to the requirements of section 14, Article II of the Constitution of North Carolina. A petition to rehear was pending when the above-entitled suit was called, whereupon certain questions were certified to this Honorable Court, and the petition to rehear in the Stanly County case was continued to await your decision.

This action was taken because the principal point of decision, just referred to, was common to both cases, and it is respectfully submitted that as the two cases are so intimately associated and involve the same question it is not unreasonable that the Board of Commissioners of Stanly County should request the Court to allow it to be heard through its counsel on the argument in the case now before the Court.

The action of the Circuit Court of Appeals has practically blended the two suits so that a decision of the said question in one will control in the other, and it would seem very hard that on this pivotal question, practically determining this large litigation, the Board of Commissioners of Stanly County should not be heard.

We are aware that prior to the act constituting the Circuit Court of Appeals, and providing for the certification of questions to the Supreme Court, the discretion vested in the latter of hearing additional counsel was very sparingly exercised. But we respectfully submit that since the said act, under which practically several cases may, as in the present instance, be determined upon the certification in one, the rule should be so relaxed as to allow the parties concerned a reasonable hearing. The justness of this is strikingly illustrated in the present litigation, as the Stanly County case is *distinctly continued* by the Circuit Court of Appeals in order to await the decision of the question certified, and all we ask is a very short time in which to be heard in a matter so vitally affecting the tax payers of an entire county.

We also concur in the motion that this cause be advanced on the docket, as the point under consideration is involved in the bond issues of other counties and town municipalities, and an early decision, in our opinion, is of very great public concern in North Carolina.

JAS. E. SHEPHERD,

Of Counsel for the Board of Commissioners of Stanly County.

194312

No. 164.

Brief of Burton for Oxford

Filed Sept. 27, 1900.

Office Supreme
FILE
SEP 27
JAMES H. McKEN

No. 164

UNITED STATES SUPREME COURT.

COMMISSIONERS OF WILKES COUNTY

against

W. N. COLER & CO.

Brief of R. O. BURTON, for Commissioners of Oxford.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1900.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY, APPELLANT,

against

W. N. COLER & COMPANY.

Brief of R. O Burton, filed in behalf of the Commissioners of Oxford, by leave of the Court.

STATEMENT OF FACTS.

After the decision of the case of *The Commissioners of Oxford, N. C., v. The Union Bank of Richmond*, by the Circuit Court of Appeals of the 4th Circuit (96 Fed., 293), application was made by the bank for leave to file a petition to rehear. Pending the consideration of this, the Court certified up to this Court the three questions now presented; and retained the Bank's application till these questions should be answered. Thereupon the Commissioners of Oxford asked for leave here to be heard on the argument; and leave was granted to file a brief.

This case (*Oxford v. Bank*) is an action brought in the Circuit Court of the United States for the Eastern District of North Carolina, to recover judgment upon certain coupons for interest on alleged bonds, and to compel the defendant by mandamus to levy taxes and pay the same.

The pertinent facts of the case are as follows:

The General Assembly of 1891 passed an act to incorporate the Oxford and Coast Line Railroad Company, whose termini should be Oxford and Spring Hope, or some other point to be selected by the company. Laws 1891, chapter 315. The eighth and tenth sections of said act are as follows:

"Section 8. Any railroad company, whether incorporated under this or the laws of any other State, is hereby authorized to subscribe to the capital stock of said railroad company, or to lend money to or endorse the bonds or other evidences of debt of the same, and may pay for their subscription to the capital stock of said Oxford and Coast Line Railroad Company in cash, or by the issue of their bonds, or otherwise, and said Oxford and Coast Line Railroad Company may mortgage its road-bed, rolling-stock and franchises, and may issue bonds as the directors thereof may determine, and may provide for the conversion of such bonds into the capital stock of said company."

"Section 10. That whenever any county, city, town or township shall issue bonds to aid in building said Oxford and Coast Line Railroad, the money derived from the taxation of said railroad within said county shall be applied to the payment of the interest on said bonds so long as they shall remain outstanding; and in the event that two or more cities, towns or townships in any county shall issue bonds as aforesaid, then the money derived from the taxation of said railroad within said county shall be applied to the interest on said bonds in proportion to the amount of bonds so issued by said cities, towns or townships as aforesaid."

A petition was presented in 1891 to the Board of Commissioners of Oxford, asking that an election be held on the question of subscribing $40,000 to the capital stock of said railroad. The election was ordered, and resulted in favor of so subscribing. Afterwards the commissioners refused to issue

the bonds. Thereupon the said railroad company instituted suit to compel the commissioners to issue the bonds. Then an agreement was entered into by the said commissioners and the railroad company by which the commissioners agreed to donate to the railroad company $20,000 in bonds, and the railroad company agreed to release the town from its subscription. A consent judgment was entered up in conformity with this agreement. The railroad company complied with this judgment so far as it was able to do so. But it is manifest that it was able to do but little, as the road was only graded for four and a half miles, and no iron was ever laid upon it; whereas, by the agreement on which the bonds issued it agreed that the road should be fully completed and put in operation within a reasonable time from and after issuing the bonds. The bonds were issued August 1, 1892; and no road has ever been completed. The whole scheme stands abandoned.

The defendant in error purchased sixteen of said bonds in good faith, in the usual course of business, without notice, except such notice as is given by the face of the bonds, and such as the law implies.

The charter of the Oxford and Coast Line Railroad Company was not passed with the formalities required by the Constitution of North Carolina, Article 2, section 14, in this, that in the House of Representatives the bill passed its second and third readings on the same day, and on said readings the yeas and nays were not entered on the Journal. Said section of the Constitution is as follows: "No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several read-

ings, which readings shall have been on three different days, and agreed to by each House respectively; and unless the yeas and nays on the second and third readings of the bill shall have been entered on the Journal." (Art. 2, sec. 14.)

The defendant in error first sued in the Superior Court of Granville County, and the case went twice to the Supreme Court of North Carolina. (See *Union Bank v. Commissioners of Oxford*, 116 N. C., 339, and 119 N. C., 214.) In the first case no point was made about the proper passage of the railroad charter, which, the bank contends, contains the grant of power to issue bonds; and the court then held that the town had authority to issue the bonds under section 10 of the charter, Laws of 1891, chapter 315. A new trial having been granted, the case was tried again in the Superior Court, when it was made to appear that on the passage of said act in the House of Representatives, it passed its second and third readings on the same day, and the yeas and nays were not entered on the Journal on either of said readings. The court below held this defect did not vitiate the bonds, and instructed the jury to answer the issues in favor of the plaintiff. On appeal the Supreme Court held that Article 2, section 14, of the State Constitution, was mandatory, and reversed the judgment. In the lower court, on the coming down of the certificate and opinion of the Supreme Court, the plaintiff voluntarily submitted to a nonsuit, and then brought an action in the United States Court, both on the same coupons sued on in the State Court, and on other coupons falling due after the beginning of the first action.

The District Judge sitting in the Circuit Court held the bonds valid. This ruling was reversed in the Circuit Court of Appeals.

I shall confine my argument to the proper construction of the articles of the Constitution; to the soundness of the North Carolina construction of them; the propriety of following

the North Carolina cases, and to an attempt to show that no North Carolina decision inconsistent with the doctrine of these cases, has ever been delivered.

I.

The charter of the railroad company was not passed with the formalities necessary to allow a subscription by the town of Oxford, because on its second and third readings in the House the yeas and nays were not entered on the Journal, and the second and third readings were not on different days.

When the original case was first before the State court (116 N. C., 339), the power to subscribe was deduced from a section of the charter of the railroad (Laws of 1891, ch. 315, sec. 10) which is in the following words:

"That whenever any county, city, town or township shall issue bonds to aid in building said Oxford and Coast Line Railroad, the money derived from taxation of said railroad within said county shall be applied to the payment of the interest on said bonds so long as they shall remain outstanding, and in the event that two or more cities, towns or townships in any county shall issue bonds as aforesaid, then the money derived from the taxation of said railroad within said county shall be applied to the interest on said bonds in proportion to the amount of bonds so issued by said cities, towns or townships, as aforesaid."

Article 2, section 14, of the Constitution, is as follows:

"No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which readings shall have

been on three different days, and agreed to by each House respectively,' and unless the yeas and nays on the second and third readings of the bill shall have been entered on the Journal."

Article 2, section 16: "Each House shall keep a Journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly."

Article 2, section 23, provides:

"All bills and resolutions of a legislative nature shall be read three times in each House, before they pass into laws; and shall be signed by the presiding officers of both Houses."

It is conceded that on the second and third readings of this bill in the House of Representatives, the yeas and nays were not entered on the Journal.

This point has been so elaborately discussed in *Union Bank v. Commissioners of Oxford*, 119 N. C., 214; *Commissioners v. Snugg*, 121 N. C., 394; 123 N. C., 308; 122 N. C., 39; 123 N. C., 432; *Coler v. Board of Commissioners of Stanly Co.*, 87 Fed. Rep., 257; 96 Fed., 293; *Ib.*, 284, that little remains to be said upon it.

There is no conflict with *Carr v. Coke* (116 N. C., 223), as is contended by the bank. We say the point here is entirely independent of that case, and in no wise conflicts with it. *Carr v. Coke* decides that the certificate of the presiding officers is conclusive that the bill has passed. We admit its passage; it is a law of the State. But the certificate does not profess to state whether the yeas and nays were entered upon the Journal—that is something separate and apart from the certificate; and, in the nature of things, the original and best evidence of whether they were so entered is the Journal itself. The entry of the yeas and nays is not an essential of the passage of every bill—it is therefore not covered by the ratification. That does not profess to state anything about the entry. The entry is required by a totally different clause of the Con-

stitution, and neither is involved in the other. This distinction is alluded to in the concurring opinion of Montgomery, J., in *Carr v. Coke:*

"It is to be always kept in mind that the point is not as to the powers of the Supreme Court to pronounce a law, which is admitted to have been enacted, void, by reason of its unconstitutionality. Our jurisdiction in that case would be complete and unchallenged. But the question is, where *the Legislature has solemnly certified to a fact*—that is, to the passage and ratification of an act which is within its own sphere—will the judiciary be permitted to inquire into or dispute that certification?"

We dispute nothing that has been certified to; but where the certificate is silent, we seek the truth from the Journal. Texas is one of the States that hold with *Carr v. Coke,* as will appear from the somewhat inaccurate note filed with the Attorney-General's brief in *Field v. Clark,* 143 U. S., 649. But where a bill must pass by a two-thirds majority, the certificate must show the vote; and in *Ewing v. Duncan,* 81 Tex., 233, it was certified that the bill passed by a two-thirds vote—24 to 24—and the court held that a manifest mistake, and looked to the Journal for the truth.

So in *Gardner v. The Collector,* 6 Wall., 499, the approval of the President failing to show the year, resort was had to the Journal. "We are of opinion that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question—always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

A fortiori, when the question is whether the ayes and nays

are entered on the Journals. For inspection is the plain and natural way to find out.

Notwithstanding that the court of Texas is unswerving in refusing to go behind the certificate, it enforces strictly the provision of the Constitution, that the fact of signing by the presiding officers in the presence of the House *shall be entered on the Journal;* and it looks to the Journal to see if this plain Constitutional requirement has been complied with. *Hunt v. The State*, 22 Tex. App., 396. The note to *Field v. Clark* says, that this has been overruled in *Ex parte Tipton*, 28 Tex. App., 438. This is not true; the point was not involved in the latter case, which refers to and distinguishes the former without one word of dissent.

The note in *Field v. Clark* overlooked the later cases in Louisiana. Resort may there be had to the Journal and other sources of information, which in their nature are capable of conveying to the judicial mind clear and satisfactory information. It is held that when the Constitution does not require the legislative Journals to show affirmatively that a particular thing, necessary to the validity of legislative action, was done, mere silence does not invalidate; and though an enrolled bill is not conclusive proof of the valid enactment of a statute, yet the court may look beyond it to the legislative Journals, and they may supply, by presumption, everything necessary to its validity, except when the legislative Journal affirmatively shows a violation of the Constitution. *Hollingsworth v. Thompson*, 45 La. Ann., 222.

Says Mr. Cooley, Const. Lim. (6th Ed.), 163, 164: "Each House keeps a Journal of its proceedings, which is a public record, and of which the courts are at liberty to take judicial notice. If it should appear from these Journals that any act did not receive the requisite majority, or that in respect to it the Legislature did not follow any requirement of the Constitution, or that in any other respect the act was not constitu-

tionally adopted, the courts may act upon this evidence, and adjudge the statute void. But whenever it is acting in the apparent performance of legal functions, every reasonable presumption is to be made in favor of the action of a legislative body; it will not be presumed in any case, from the mere silence of the Journals, that either House has exceeded its authority, or disregarded a constitutional requirement in the passage of legislative acts, *unless where the Constitution has expressly required the Journals to show the action taken, as, for instance, where it requires the yeas and nays to be entered.*"

"It is required by the Constitutions of several of the States, that no bill shall have the force of law until on three several days it be read in each House, and free discussion allowed thereon; unless, in case of urgency, four-fifths, or some other specified majority of the House, shall deem it expedient to dispense with this rule. The Journals which each House keeps of its proceedings ought to show whether this rule is complied with or not; but in case they do not, the passage in the manner provided by the Constitution must be presumed in accordance with the general rule, which presumes the proper discharge of official duty." *Ib.*, 168.

"It is also provided in the Constitutions of some of the States that, on the final passage of every bill, the yeas and nays shall be entered on the Journal. Such a provision is designed to serve an important purpose in compelling each member present to assume as well as to feel his due share of responsibility in legislation, and also in furnishing definite and conclusive evidence whether a bill has been passed by the requisite majority or not. The Constitution prescribes this as the test by which to determine whether the requisite number of members vote in the affirmative. The office of the Journal is to record the proceedings of the House, and authenticate and preserve the same. It must appear on the

face of the Journal that the bill passed by a constitutional majority. These directions are all clearly imperative. They are expressly enjoined by the fundamental law as matters of substance, and can not be dispensed with by the Legislature." *Ib.*, 169.

"When the legislative power of a State is to be exercised by a department composed of two branches, or, as in most of the American States, of three branches, and these branches have their several duties marked out and prescribed by the law to which they owe their origin, and which provides for the exercise of their powers in certain modes and under certain forms, there are other questions to arise than those of the mere intent of the law-makers, and sometimes forms become of the last importance. For in such case not only is it important that the will of the law-makers be clearly expressed, but it is also essential that it be expressed in due form of law, since nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential." *Ib.*, 156.

"It will sometimes be found that an act of the Legislature is opposed in some of its provisions to the Constitution, while others, standing by themselves, would be unobjectionable. *So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others.* In any such case the portion which conflicts with the Constitution, *or in regard to which the necessary conditions have not been observed, must be treated as a nullity.*" *Ib.*, 211.

This is precisely our contention. The act is good as a railroad charter, but not as an act to authorize a subscription to a railroad. There has been in no State of the Union except

Kentucky an adjudication that militates against my contention—in other words, no other court has held that the requirement that the yeas and nays shall be entered in the Journal is not mandatory; nor has any other court held that the certificate of the presiding officers is a bar to an inquiry into the truth of the matter.

People v. Chenango Co., 8 N. Y., 317, as to entry of the yeas and nays, may be cited as authority against my view but the expression is wholly *obiter*, and has never been followed so far as I can discover.

The following require the yeas and nays to be entered on the Journal, on the final passage of a bill, in all cases:

Ala. Const., Art. 4, s. 21; Ark., Art. 5, s. 22; Cal., Art. 4, s. 15; Colo., Art. 5, s. 22; Fla., Art. 3, s. 17; Idaho, Art. 3, s. 15; Ill., Art. 4, s. 12; Kan., Art. 2, s. 10; Ken., s. 46; La., Art. 37; Md., Art. 3, s. 28; Mich., Art. 4, s. 19; Mo., Art. 4, s. 31; Mon., Art. 5, s. 24; Neb., Art. 3, s. 10; Nev., Art. 4, s. 18; N. J., Art. 4, s. 6; N. D., Art. 2, s. 65; Ohio, Art. 2, s. 9; S. D., Art. 3, s. 18; Wash., Art. 2, s. 22; Wyo., Art. 3, s. 25; N. Y., Art. 3, s. 15.

The following do not:

Conn., Art. 3, s. 9; Del., Art. 2, s. 8; Ind., Art. 4, s. 12 and 18; Iowa, Art. 3, s. 10; Me., Art. 4, s. 59; Mass., Part 2, ch. 1, Art. 2; Minn., Art. 4, s. 20; Miss., Art. 4, s. 5, but it does require entry of certain other proceedings; N. H., Part 2, Art. 7; Oregon, Art. 4, s. 19; Penn., Art. 2, s. 12; R. I., Art. 4, s. 8; S. C., Art. 2, s. 21, 26; Tenn., Art. 2, s. 21—see s. 18, as to fact of signing being on Journal; Tex., Art. 3, see Art. 3, 38; Vt., Chap. 2, s. 14; Ga. (Bills appropriating money alone require entry of yeas and nays), Art. 3, s. 7, p. 12; Va., Art. 5, s. 10; W. Va., Art. 6, s. 29 and 31; Wis., Art. 4, s. 20.

Every one of the former class hold to the rule that the Journal controls the certificate, except New Jersey, Nevada and Kentucky.

The first decisions in California were under its old Constitution, and the Judge who delivered the opinion in the leading case of *Sherman v. Story*, 30 Cal., 253, held that since the change, the court will look to the Journals to see if the bill passed by a majority vote. *San Mateo Co. v. So. Pacific R. R. Co.*, 8 Sawy., 238; 51 Am. Dec., 618; *Weill v. Kingfield*, 54 Cal., 111.

In Louisiana the Journals are now examined. *Morris v. Mason*, 42 La. An., 669; *Hollingsworth v. Thompson*, 45 La. An., 222.

In New Jersey, the decision in *Pangborn v. Young*, 32 N. J. L., 29, does not conflict with my view. The effort in that case was to show that the law certified was different from that passed.

The point has never been presented in Nevada. But where the question was as to the passage of a Constitutional amendment, as to which the Constitution required the amendment and the yeas and nays to be entered on the Journal, the court held with the Iowa court, that the requirement was mandatory. 19 Nev., 391; *Koehler v. Hill*, 60 Iowa, 544. And this is in two States where the enrolled bill is ordinarily the ultimate proof of the law.

In Missouri, after the amendment of its Constitution so that the yeas and nays are required to be entered, the decisions changed, and the provision was held mandatory. *State v. Mead*, 71 Mo., 266, 270.

It is necessary to say but little about the decisions of such States as hold the contrary view to *Carr v. Coke*. For if they allow the Journal to control the certificate, *a fortiori*, should they hold that the Journal must be examined when it is alleged to show, *affimatively*, an express violation of the Constitution.

New York is classed as wavering in the note to *Field v. Clark*. But so far as pertinent to this discussion, there has

been no division of sentiment. The following cases show the present state of the law as to the constitutional requirement that certain bills shall pass by a two-thirds vote: *Rumsey v. Railroad*, 130 N. Y., 88; *People v. Petrea*, 92 N. Y., 128; *People v. Commissioners of Highways*, 54 N. Y., 276; *People v. Allen*, 42 N. Y., 378; *People v. Purdy*, 2 Hill, 31; *Purdy v. People*, 4 Hill, 384, 390; *DeBow v. People*, 1 Denio, 9; *Commercial Bank v. Sparrow*, 2 Denio, 97.

A statute of New York provides that the assent of two-thirds of the members elected to each branch of the Legislature is requisite to every bill appropriating the public moneys or property for local or private purposes; and no bill shall be deemed to have passed by the assent of two-thirds of the members elected to each House unless so certified by the presiding officer of each House. The certificate failed to show that an act so passed—it merely stated that it was passed, and that two-thirds of the members elected were present. The court held it proper in that case to look to the Journal to see whether it properly passed for the purpose contemplated. *Rumsey v. Railroad, supra.*

In *People v. Allen, supra*, the court construed section 9, Article 1, of the New York Constitution, which provides that "the assent of two-thirds of the members elected to each branch of the Legislature shall be requisite to every bill appropriating the public moneys or property for local or private purpose." The act was certified by the President of the Senate and the Speaker of the Assembly, and signed by the Governor, but did not receive the assent of the members elected to each branch of the Legislature. The act was held void. [See an apposite discussion on another provision in *People v. Petrea, supra.*]

In *McDonald v. Dixon*, 80 Wis., 407, the court said that it would examine the Journal far enough to see whether an act published as law was actually passed in accordance with Con-

stitutional requirements. The clause of the Constitution was very similar to the one now before the court.

Constitutions usually provide that the vote on final passage of a bill shall be by yea and nay, which shall be entered on the Journal. The failure to comply with such a provision, as a rule, renders the law void.

23 Am. and Eng. Enc. L., 171.

In Indiana, when a bill has been passed over the Governor's veto, no certificate of such passage is required, and the Journals are resorted to for the evidence therefor.

State v. Denny, 118 Ind., 456.

So, in cases of doubt, the court may look to the Journals to ascertain the legislative intent.

Edgar v. Board of Commissioners, 70 Ind., 331.

The Illinois decisions, on account of the requirement for the entry of the yeas and nays on the Journals, furnish apt illustrations of the doctrine. I refer to—

Spangler v. Jacoby, 14 Ill., 297 (58 Amer. Dec., 571).
Supervisors of Schuyler Co. v. People, 25 Ill., 183.
Ryan v. Lynch, 68 Ill., 160.
Burritt v. Commissioners of State Contracts, 120 Ill., 322.
People v. Starne, 35 Ill., 142.
(See 85 Amer. Dec., 348, for note; also, 51 Amer. Dec., 616—a very full note on the whole doctrine.)

The doctrine of that State is well set out in—

South Ottawa v. Perkins, 94 U. S. 260, and
Post v. Supervisors, 105 U. S., 667.

Field v. Clark, 143 U. S., 649, in nowise conflicts with our view. The court (p. 671) carefully pretermits a discussion

of the question. "In regard to certain matters, the Constitution expressly requires that they be entered on the Journal. To what extent the validity of legislative action may be affected by the failure to have those matters entered on the Journal, we need not inquire. *No such question is presented.* But it is clear that, in respect to the particular mode in which, or with what fulness, shall be kept the proceedings of either House relating to matters *not expressly required to be entered on the Journals* * * * * these and like matters were left to the discretion of the respective Houses of Congress."

The point of that case is on page 672: "The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two Houses of such a bill as one that has passed Congress. It is a declaration by the two Houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the Government, and that it is delivered to him in obedience to the Constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested receives his approval, and is deposited in the public archives, its authentification as a bill *that has passed Congress* should be deemed complete, and unimpeachable." This is clearly stated as the point involved in said case, in *Lyon v. Woods*, 153 U. S., 662. That the point was left an open one in that case further appears from *United States v. Ballin*, 144 U. S., 1, 4: "The Constitution (Article 1, section 5), provides that 'each House shall keep a Journal of its proceedings;' and that the 'yeas and nays of the members of either House on any question, shall *at the desire of one-fifth of those present*, be entered on the Journal.' Assuming that by reason of this latter clause reference may be had to the Journal, to see whether the yeas and nays were ordered, and if so, what was the vote disclosed thereby; and assuming,

though without deciding, that the facts which the Constitution requires to be placed on the Journal may be appealed to on the question whether a law has been legally enacted, yet, if reference may be had to the Journal, it must be assumed to speak the truth."

It is enough for our contention to hold that where the Constitution requires a fact affirmatively to appear by the Journals, a failure so to show it, renders the part of the bill affected by such failure void. The provision is of great importance. To avoid waste of public money and the imposition of unusual taxes upon the people, the fundamental law requires their servants to make a record of their votes. The object is twofold; to show that the bill was not passed carelessly or improvidently, but with the due attendance and sanction of the members; and that the people may hold their servants amenable for extravagant or corrupt legislation.

Besides, constitutional provisions should be held mandatory. "Constitutions do not usually undertake to provide mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done, and they must then be regarded in the light of limitations upon the power to be exercised." Cooley, Cons. Lim., 93. "It will be found upon full consideration to be difficult to treat any Constitutional provision as merely directory and not imperative." *Id.*, 98. See *State v. Patterson*, 98 N. C., 660.

Said Mr. Justice Bradley, in delivering the opinion of the court in *South Ottawa v. Perkins*, 94 U. S., 260: "There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the Legislature could thus be a law in one case, and for one party, and not a law in another case, and for

another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another, in the same State. And whether it be a law or not a law, is a judicial question, to be settled by the courts and judges. The doctrine of estoppel is totally inadmissible in the case."

Again: "In our judgment it was not necessary to have raised an issue on the subject, except by demurrer to the declaration. The court is bound to know the law, without taking the advice of a jury on the subject. When once it became the settled construction of the Constitution of Illinois that no act can be deemed a valid law unless by the Journals of the Legislature it appears to have been regularly passed by both Houses, it became the duty of the courts to take judicial notice of the Journal entries in that regard. The courts of Illinois may decline to take that trouble, unless parties bring the matter to their attention; but on general principles the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States." *Ib.*

Again: "Not only the courts, but individuals, are bound to know the law, and can not be received to plead ignorance of it. The holder of the bonds in question can claim no indulgence on that score, and can take no advantage from the allegation that he is a *bona fide* purchaser without notice." *Ib.*

See, also, *Gardner v. Collector*, 6 Wall., 511; and *Town of Walnut v. Wade*, 103 U. S., 683. In the last case the court ignored the findings of the court below as to the existence of the statute, and examined the Journals for itself, to ascertain whether the act was duly passed.

Supervisors v. Post was one of the cases heard with *South Ottawa v. Perkins*. It was again before the court in *Post v. Supervisors*, 105 U. S., 667. Mr. Justice Gray, speaking for a unanimous court, says:

"Second. Whether a seeming act of the Legislature is or is not a law, is a judicial question to be determined by the court, and not a question of fact to be tried by a jury.

"Third. The construction uniformly given to the Constitution of a State by its highest court is binding on the courts of the United States as a rule of decision.

"Fourth. An act of the Legislature of a State which has been held by its highest court not to be a statute of the State, because never passed as its Constitution requires, can not be held by the courts of the United States, upon the same evidence, to be a law of the State.

"Fifth. That which is not a law can give no validity to bonds purporting to be issued under it, even in the hands of those who take them for value, and in the belief that they have been lawfully issued. * * * Nor is it of any importance that the act of 1857 had been assumed to be an existing law in *Dunnovan v. Green*, 57 Ill., 63; and in *Force v. Batavia*, 61 Ill., 199; for in each of these cases the validity of the statute was not controverted, and by the established practice of that court no evidence of the contents of the Journals could be considered on appeal, which had not been produced and made part of the case in the court below."

In *Lyons v. Woods*, 153 U. S., 649, 663, the court, speaking through the Chief Justice, says: "The question whether a seeming act of the Legislature has become a law in accordance with the fundamental law, is a judicial one, to be tested by the courts and judges, and not a question of fact, to be tried by a jury."

Said Mr. Justice Gray, in delivering the opinion of the court in *Jones v. United States*, 137 U. S., 202: "In the ascertainment of any facts, of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience, from such sources as they may deem most trustworthy. * * * Upon the question of the existence of a public statute, or of the date when it took effect, they may consult the original roll, or other official records."

In re Duncan, 139 U. S., 449, 457, Mr. Chief Justice Ful-

ler, speaking for the court, says: "The distinction is recognized between matters of which the court will take judicial cognizance 'immediately, *suo motu*,' and those which it will not notice 'until its attention has been formally called to them.' (Gresl. Eq. Ev., 292, 306.) As to the last, Mr. Gresley says: 'It will not point out their applicability, nor care for them, but if they are once put in by either party, it will investigate them, and will bring its own judicial knowledge to supply or assist their proof, and will then adopt them as its own evidence, independently of the parties.'"

We need not stop to argue that a municipal promise to pay can only be founded on a right to tax. The validity of a contract which can only be fulfilled by taxation depends on the power to levy a tax for that purpose. *Loan Association v. Topeka*, 20 Wall., 655; *Aspinwall v. Commissioners*, 22 How., 364; *Ottawa v. Carey*, 108 U. S., 122; *Rolles Co. Ct. v. United States*, 105 U. S., 733.

Since the careful discussion of the provision of the Constitution in question, in *Union Bank of Richmond v. Oxford*, 119 N. C., 214, and *Commissioners v. Snuggs*, 121 N. C., 394, I might rest the case upon the construction of the State court; the more so when it is reinforced by the decision of Judge Simonton in *Coler v. Board*, 89 Fed. Rep., 257, and the decision of the Circuit Court of Appeals in this case (*Union Bank v. Commissioners*, 96 Fed., 293), and in *Board of Commissioners V. Coler*, 96 Fed., 284). But I will discuss other phases of the case.

II.

The decision of the State Court is controlling as to the proper passage of the law as a taxing act.

The defendant in error says it is not bound by the State decision because his rights accrued before that decision, and therefore this court will exercise its independent judgment as to the meaning of the North Carolina Constitution. *Folsom v. Ninety-six*, 159 U. S., 611.

It does not matter in this case whether the rule of that case is followed, or the rule laid down in *Stutsman County v. Wallace*, 142 U. S., 293, 306; *Norton v. Shelby Co.*, 118 U. S., 425, 439; *Gormley v. Clark*, 134 U. S., 338, 348; *Bauserman v. Blunt*, 147 U. S., 647, 657. The result, I respectfully submit, will be the same.

It seems to me that whatever may be said about the rule laid down in *Folsom v. Ninety-six*, there is a peculiar propriety in leaving to the State court the settlement of all questions relating to the proper passage of its own laws. Else we shall have the existence or non-existence of a law dependent upon the forum in which it is invoked. It may be a law for a plaintiff in Massachusetts, who sues a citizen of North Carolina, but not for a citizen of North Carolina who sues in his State court a citizen of Massachusetts. Indeed, if the citizen of Massachusetts desires to sue another citizen of that State, and the State court has jurisdiction, then his law ceases to be law, and the accident of jurisdiction destroys the existence of his law.

The Supreme Court has spoken very clearly on this subject. A very apposite case is *South Ottawa v. Perkins*, 94 U. S., 260, where the question arose whether an act of the Legislature of Illinois authorizing a town to issue bonds was properly passed. In that case it had been long established, however, that it was necessary to the validity of a statute that it should appear by the Journals that it was duly passed in the manner required by the Constitution.

Said Mr. Justice Bradley, in delivering the opinion of the court: "It would be a very unseemly state of things, after the courts of Illinois have determined that a pretended statute of that State is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise.

"It is declared by the Judiciary Act as a fundamental prin-

ciple,'that the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.' (1 Stat. at Large, 73, sec. 34.) And this court has always held that the laws of the States are to receive their authoritative construction from the State courts, except where the Federal Constitution and laws are concerned: and the State Constitutions, in like manner, are to be construed as the State courts construe them."

"If, therefore, the law in question had never been passed upon by the State courts, the courts of the United States would, nevertheless, be bound to give to the Constitution of Illinois the same construction which the State courts give to it, and to hold a pretended act of the Legislature void and not a law which the State courts would hold to be so. Otherwise, we should have the strange spectacle of two different tribunals,having coördinate jurisdiction in the same State,differing as to the validity and existence of a statute of that State, without any power to arbitrate between them. In speaking, however, of their jurisdiction as being coordinate, it is only meant that one has no power to enforce its decisions upon the other. As a matter of propriety and right, the decision of the State courts on the question as to what are the laws of the State is binding upon those of the United States.

"But the law under consideration has been passed upon by the Supreme Court of Illinois. This ought to have been sufficient to have governed the action of the court below."

This case was affirmed in *Post v. Supervisors*, 105 U. S., 667.

Said Mr. Justice Field, in delivering the opinion of the court in *Norton v. Shelby County*, 118 U. S., 425, 440:

"On many subjects the decisions of the courts of a State are merely advisory, to be followed or disregarded, according

as they contain true or erroneous expositions of the law, as those of a foreign tribunal are treated. But on many subjects they must necessarily be conclusive; such as relate to the existence of her subordinate tribunals; the eligibility and election or appointment of their officers; *and the passage of her laws.* No Federal Court should refuse to accept such decisions as expressing on those subjects the law of the State. If, for instance, the Supreme Court of a State should hold that an act appearing on her statute book was never passed, and never became a law, the Federal courts could not disregard the decision and declare that it was a law, and enforce it as such." He cites *South Ottawa v. Perkins*, and *Post v. Supervisors.*

Said Mr. Chief Justice Fuller, speaking for the court in *In re Duncan*, 139 U. S., 449, 456: "It is unnecessary to enter upon an examination of the rulings in the different States upon the question whether a statute duly authenticated, approved and enrolled can be impeached by resort to the Journal of the Legislature or other evidence, for the purpose of establishing that it was not passed in the manner prescribed by the State Constitution. The decisions are numerous, and the results reached fail of uniformity. *The courts of the United States necessarily adopt the adjudication of the State courts on the subject.*"

At any rate, "the Federal courts will lean toward an agreement of views with the State court if the question seems to them balanced with doubt." (*Folsom v. Ninety-six*, *supra*, p. 625.) How much more so, when the great weight of authority is so largely in favor of the construction of the State court!

III.

The State Supreme Court has never enunciated a doctrine inconsistent with Bank v. Commissioners, 119 N. C., 214.

The clause of the State Constitution (Art. 2, sec. 14) had never been passed upon prior to the above case.

Several authorities in the lower court were relied on to show a former rule different from the present.

Brodnax v. Groom, 64 N. C., 244, was a construction of Article 2, section 12, of the Constitution, which provides: "The General Assembly shall not pass any private law, unless it shall be made to appear thirty days' notice of application to pass such a law shall have been given, under such direction, and in such manner as shall be provided by law."

The *rationale* of the decision is that the Legislature must ascertain before passing a private law that this preliminary notice has been given. Under the organic law, it will not consider such a bill till it is shewn that this provision has been complied with. But its determination is left to the Legislature, and must be conclusive, because no record is required to be made of the notice, and the certificate of the Speakers is conclusive. In the eye of the law no such bill can be passed till notice has been given. The certificate that it has passed involves a certificate that the notice has been given; and this the law will not subject to collateral attack.

Article 2, section 12, relates to preliminaries, the due performance of which the Legislature must ascertain before it acts. But Article 2, section 14, prescribes a method of passage, which the Journals must show. The one looks to a determination by the body that a publication has been made. The other lays down a rule for the passage of taxing acts, and requires the Journal to show affirmatively a compliance with it.

Suppose the notice under section 12 has been given yet the

Legislature determines otherwise, and therefore refuses to pass the act, how can the courts interfere? The determination is for the Legislature. But the Journal shows the method of passage, and the courts can see whether it has been observed.

But in 1878, in *Gallin v. Tarboro*, 78 N. C., 119, the court says that if it appeared by the Journal that the notice was not given it would probably hold the act void.

In *Scarboro v. Robinson*, 81 N. C., 409 (in the year 1879), the only points decided by the court was that the signatures of the presiding officers, affixed during the session of the General Assembly, are essential to the validity of a law, and that the court could not compel the officers, after the expiration of the session, to sign a bill that had really passed.

The decision is a construction of Article 2, section 23, which provides: "All bills and resolutions of a legislative nature shall be read three times in each House, before they pass into laws; and shall be signed by the presiding officers of both Houses."

The court expressly pretermitted any decision upon the right to attack an "act clothed with the prescribed forms of law and placed in the keeping of the proper depository" by evidence derived from the Journals or other extraneous sources. (Pp. 415, 418).

In 1887, *State v. Patterson*, 98 N. C., 660, construed Article 2, section 21, of the Constitution: "The style of the acts shall be: The General Assembly of North Carolina do enact."

This was held to be mandatory. "When the Constitution prescribes and directs in terms, or by necessary implication, that a particular power shall be exercised in a specified way, or a particular thing shall be done by a particular coordinate branch of government—as the Legislature—or by a particular officer or class of officers, and prescribes the way and manner of doing it—such direction can not be disregarded—a due ob-

servance of it is essential, because the Constitution so provides, and its provisions are not in vain or of trifling moment. As we have said, they are organic—made upon solemn consideration by the sovereign authority, and contain general, essential provisions—details are avoided, unless deemed important—essential * * * The answer to these and the like questions must be, that requirements of the Constitution shall prevail and be observed; and when it prescribes that a particular act or thing shall be done in a way and manner specified, such direction must be treated as a command, and an observance of it essential to the effectiveness of the act or thing to be done. Such an act can not be complete—such a thing is not effectual until done in the way and manner so prescribed." *Ib.*, 662, 663.

Such were the decisions up to *Carr v. Coke*, 116 N. C., 223. The bank purchased the bonds long before this case, and brought up its first appeal to the same term. 116 N. C., 339. So it can not claim to be injured by any change of judicial construction as enunciated in that case. Indeed I am at a loss to see how anyone can find, in the light of the decisions I have quoted, any change by the court on this subject.

Nor is there aught in *Carr v. Coke* that conflicts with *Bank v. Oxford*. As was well said by Clark, J., in the latter case (119 N. C., 222): "This case has no analogy to *Carr v. Coke*, 116 N. C., 223. That merely holds that when an act is certified to by the Speakers as having been ratified, it is conclusive of the fact that it was read three several times in each House and ratified. Constitution, Article 11, section 23. And so it is here; the certificate of the Speakers is conclusive that this act passed three several readings in each House and was ratified. The certificate goes no further. It does not certify that this act was read three several days in each House and that the yeas and nays were entered on the Journals. The Journals were in evidence and showed affirm-

atively the contrary. The people had the power to protect themselves by requiring in the organic law something further, as to acts authorizing the creation of bonded indebtedness by the State and its counties, cities and towns, than the fact certified to by the Speakers of three readings in each House, and ratification. This organic provision plainly requires, for the validity of this class of legislation, *in addition* to the certificates of the Speakers, which is sufficient for ordinary legislation, the entry of the yeas and nays on the Journals on the second and third readings in each House."

The distinction is well shown by the railroad charter involved. The certificate of the Speakers is conclusive that the railroad charter passed, and its passage as a charter only is unassailable. But when the Bank attempts to educe from it a power to tax the people of Oxford, it is met by the fact that the charter is not good as a taxing act because the additional and necessary solemnities were not observed, and the act is not good for such purpose.

R. O. BURTON,

Attorney for Commissioners of Oxford.

Raleigh, N. C., September 21, 1900.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

1944

No. 167.

Br. of Shepherd for Stanly Co.

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No. 167

UNITED STATES SUPREME COURT.

COMMISSIONERS OF WILKES COUNTY, *et al.*,

against

W. N. COLER & CO.

BRIEF OF

JAMES E. SHEPHERD,

FOR COMMISSIONERS OF STANLY COUNTY.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY *et al.*,
APPELLANTS,
against
W. N. COLER AND COMPANY, APPELLEES.

Brief of Argument of James E. Shepherd on Behalf of the Board of Commissioners of Stanly County, Submitted by Leave of the Court.

BRIEF SUMMARY OF CASE.

The above-entitled suit was brought by the complainants, Coler & Co. *v* The Commissioners of Wilkes County, for the recovery of the amount of certain bonds issued by said county, and a decree below was entered in favor of the complainants. The defendant Board (now the plaintiffs in error) appealed to the United States Circuit Court of Appeals for the fourth circuit, and the appeal is now pending in that Court.

The said Coler & Co. also brought a suit against the Board of Commissioners of Stanly County to recover the amount of certain bonds issued by that county. The suit was tried before the Hon. Chas. H. Simonton, Circuit Court Judge, who entered a decree against the said county, which upon appeal to the Circuit Court of Appeals, was reversed and the bonds declared void.

A petition filed by the complainants to rehear is now pending in that Court, the hearing of which has been continued to await the decision of this Court upon the questions certified.

The Union Bank of Richmond also brought a suit against the Commissioners of the town of Oxford for the recovery of the amount due on certain bonds issued by that municipality. This suit was tried before Hon. Thos. R. Purnell, District Judge, who entered a decree in favor of the plaintiffs, and this decree was reversed by the said Court of Appeals.

96 Fed. Rep., 293.

A petition to rehear was filed by the plaintiffs, and the hearing of this petition has also been continued to await the decision of this Court upon the questions certified as aforesaid.

In all of these cases the chief question common to all was whether the particular Acts of the General Assembly allowing the said several municipalities to submit the question of the issue of the bonds to the people were valid. The Supreme Court of North Carolina and the United States Circuit Court of Appeals have decided that these Acts were invalid because they were not passed in conformity with section 14, Article 2, of the Constitution of North Carolina, and other provisions referred to in the certificate.

Peculiar to each of the cases were questions of construction of the various Acts, all of which were decided adversely to the validity of the bonds by the State Supreme Court and Federal Court of Appeals.

Brief of Argument.

It was found as a fact, and indeed conceded in all of these cases, that the special Acts of the Legislature under which the bonds were issued were not passed according to the requirements of Article 2, section 14, of the State Constitution. The decision of the Supreme Court of North Carolina upon

the effect of this failure to observe these requirements is to be found, as to the bonds of the county of Stanly, in the case of *Snuggs* v. *Board of Commissioners*, 121 N. C., 394. It is there held that the said special acts were void, even in the hands of *bona fide* purchasers, as it is always incumbent upon the purchaser to examine whether the power to issue has been duly granted. The opinion of the Court is fully sustained by authority, and cites the case of *Bank* v. *Commissioners of Oxford* (119 N. C., 214), decided in 1896, which was the *first decision upon the said constitutional provision ever made by the State Supreme Court.* The opinion in this case cites all the leading authorities, and it is deemed unnecessary to repeat them here. This decision has been uniformly followed ever since (see cases cited in the certificate), and it clearly shows that the State Supreme Court had never before passed upon the question nor decided anything inconsistent with the conclusion reached. All the previous cases cited upon this point were carefully reviewed and most clearly distinguished. See also brief of R. B. Burton filed herein.

In the Stanly County case, *supra*, and in *Board of Commissioners* v. *Call* (123 N. C., 308), it was urged that authority to issue the bonds was also to be found in sections 1996-2000, general provisions of The Code, but after an elaborate discussion it was held by the Court that those sections applied only to roads whose construction had begun, but which were unfinished at the time of the adoption of the State Constitution of 1868. The Court further held that the language of section 1996, "any railroad in which the citizens of the county may have an interest," means a *pecuniary interest*, and not a mere general interest as contended for by counsel. It is obvious that either of these two constructions of The Code (sections 1996-2000) would have been fatal to the authority claimed. It is not contended by any one that the Supreme Court had ever before been called upon to construe the said sections nor indeed can it be shown that the slightest reference to them has ever been made.

The first question in the certificate is whether the Circuit Court of the United States is bound to follow the decisions of the State Supreme Court upon the points above mentioned. As we have just said, there is and has been no contention that the State Supreme Court has ever passed upon the above sections of The Code, nor do we understand that it is insisted that it really ever had under their consideration Article 2, section 14, of the Constitution, before the bonds in question were issued.

About all the cases upon this point relied upon by the plaintiffs in error are *Carr* v. *Coke*, 116 N. C., 223; *State* v. *Robinson*, 81 N. C., 409; *State* v. *Patterson*, 98 N. C., 660; and *Brodnax* v. *Groom*, 64 N. C., 244. A glance at these will show that they have no bearing upon the point under consideration. They have no relation to the said constitutional provision in reference to the pledging of the faith or credit of the State or county, and only relate to questions concerning the sanctity and validity of an enrolled bill when *passed* under the ordinary provisions of the Constitution.

The cases of Snugg, Call, and Town of Oxford, *supra*, review and distinguish the above decisions from those in which a mandatory requirement of the fundamental law has not been complied with, and which requirement is a condition precedent to the validity of the legislation. The Court, however, upon this point is respectfully referred to the elaborate discussion by Goff, Judge, in delivering the opinion of the Circuit Court of Appeals in this case (*Board of Commissioners of Stanly County* v. *Coler*), to be found in 96 Fed. Rep., 284. This opinion takes up one by one the cases above referred to and clearly shows that they have no bearing on this discussion, and could not have warranted a purchaser in assuming that the Court had ever decided that the said constitutional provision did not mean precisely what it so plainly and unequivocally says. The Court observes:

"The contention of the appellees that there were prior adjudications of the Supreme Court of North Carolina, inconsistent with the decisions of that Court in the cases of *Union Bank of Richmond* vs. *Commissioners of Town of Oxford*, and *Board* vs. *Snuggs*, *supra*, which had become rules of property, and which were overruled by those decisions, is not sustained by an analytical examination of the cases referred to, and in our opinion that Court has not, in any of the cases called to our attention, enunciated a doctrine really in conflict with its decisions in the two cases we have last mentioned."

After referring to the decisions of the State Supreme Court declaring the special acts invalid, and that Code, sections 1996-2000, did not embrace railroads not begun before the Constitution of 1868, and then only those in which the citizens had a *pecuniary* interest, the opinion proceeds:

"With these decisions of the Supreme Court of North Carolina we are in full accord. If we had reached a different conclusion, nevertheless would not the determination of the Court of last resort in North Carolina, upon the questions involved herein, relating, as they do, to the Constitution of that State, and to the validity of certain acts of its General Assembly and their construction, be respected by this Court? Indeed, are we not bound by them? The Supreme Court of the United States in *Leeper* v. *Texas*, 139 U. S., 462, 467, 11 Sup. Ct., 577, 579, said:

"'It must be regarded as settled that whether the statutes of a Legislature have been fully enacted in accordance with the requirements of the Constitution of such State is not a Federal question, and the decision of State courts as to what are the laws of the State is binding upon the courts of the United States *Town of South Ottawa* v. *Perkins*, 94 U. S., 260, 268; *Post* v. *Supervisors*, 105 U. S., 667; *Norton* v. *Shelby Co.*, 118 U. S., 425, 440, 6 Sup. Ct., 1121; *Railroad Co.* v. *Georgia*, 98 U. S., 359, 366; *Balfwin* v. *Kansas*, 129 U. S., 52, 8 Sup. Ct., 193.'

"In *Post* v. *Supervisors*, 105 U. S., 667, Mr. Justice Gray said:

"'* * * * *Third.* The construction uniformly given to the Constitution of a State by its highest court is binding on the courts of the United States as a rule of decision. *Fourth.* An act of the Legislature of a State which has been held by its highest court not to be a statute of the State, because never passed as its Constitution requires, can not be held by the Courts of the United States upon the same evidence to be a law of the State. *Fifth.* That which is not a law can give no validity to bonds purporting to be issued under it, even in the hands of those who can take them for value and in the belief that they have been lawfully issued. It was accordingly held that the Act of the General Assembly of Illinois of February 18, 1857, under which the bonds in suit were issued, having been adjudged by the Supreme Court of that State, in 1870, in the case of *Ryan* v. *Lynch*, 68 Ill., 160, and

Miller v. *Goodwin*, 70 Ill., 659 upon proof that the Journals did not show it to have been enacted in conformity with the requirements of the Constitution, to have never become a law, and to have never conferred any power, although referred to in later statutes as an existing law, those decisions must govern the action of the courts of the United States. The weight of those decisions as authoritative exposition of the Constitution of the State is not affected by the fact that these plaintiffs were not parties to the suits in which they were delivered. *Elmwood* v. *Marcy*, 92 U. S., 289; *East Oakland Tp.* v. *Skinner*, 94 U. S., 225.'"

In illustration of how far the Federal Courts follow the adjudication of the State Courts in the construction of a law, the Court is respectfully referred to the case of *Southern Ry. Co.* v. *North Carolina Corporation Commission*, 99 Fed. Rep., 162. This is perhaps the most important case ever instituted in North Carolina, and involved the validity of the assessment for taxation of all the railroad property therein. The Circuit Judge first held that under the various Acts of the Legislature the former Commission, called the North Carolina Railroad Commission, (the body that made the assessment), had been repealed, but while the case was still under the control of the Court, the Supreme Court of North Carolina, in a controversy between persons claiming to be commissioners (*Abbott* v. *Beddingfield*, 125 N. C., 256), decided to the contrary, and upon a rehearing the Federal Circuit Judge reversed his former ruling and followed that of the State Court. The opinion of the Circuit Judge is in 99 Fed. Rep., 162, and is replete with authority sustaining his action. See also *Hartford Fire Ins. Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.* (Nov., 1899, 20 Sup. Ct., 33), the latest decision of this Court upon the subject, from which we take the following extract:

"The first opinion of the Supreme Court of Iowa in the case of *Griswold* v. *Illinois C. R. Co.* was delivered after the agreement now in question was made. The final decision in that case, reversing the former opinion, was made after repeated arguments and full consideration; was nowise inconsistent, to say the least, with the decision or the opinion of that court in any other case, and was rendered before the case at bar was decided in the Circuit Court of the United States. Under such circumstances, that decision, being upon a question of statutory and local law, was rightly followed by

the Circuit Court. *Rowan* v. *Runnels*, 2 How., 134, 139; *Morgan* v. *Curtenius*, 20 How., 1; *Fairfield* v. *Gallatin Co.*, 100 U. S., 47; *Burgess* v. *Seligman*, 107 U. S., 20; *Bauserman* v. *Blunt*, 147 U. S., 647, 653, 656; *Williams* v. *Eggleston*, 170 U. S., 304, 311; *Sioux City Terminal R. and Warehouse Co.* v. *Trust Co. of N. A.*, 173 U. S., 99; *Wade* v. *Travis Co.*, 174 U. S., 499."

It is respectfully submitted that if the ruling of the State Court is adopted, the other questions are easily answered, inasmuch as every purchaser is affected by a want of power, and it is incumbent upon him to examine into the law under which the power is sought to be exercised, both as to the validity as well as the construction of such law. In the Stanly County case the bonds on their face *recite* that they were issued under a special Act ratified in March, 1887, and of sections 1996, 1997, 1998. The Supreme Court of North Carolina has decided that the said sections, construed with reference to the other parts of the Constitution and laws of the State, apply only to railroads unfinished at the adoption of the Constitution in 1868. The want of power being thus manifest by the inspection of the Journals, as well as by a proper construction of The Code provisions, it is too well settled to require the citation of much authority that even *bona fide* purchasers are affected by the infirmity.

Brenham v. German-Amer. Bank, 144 U. S., 173-610.
Barnett v. Dennison, 145 U. S., 135.
South Ottawa v. Perkins, 94 U. S., 260.
Merchants Bank v. Bergen Co., 115 U. S., 384.
Norton v. Brownsville.
Lake Co. v. U. S., 674.

If the Court felt at liberty to review the construction placed upon the provisions of the Code, sections above referred to, we respectfully submit that such construction is abundantly vindicated by the reasoning and authorities cited in *Snuggs* v. *Commissioners*, *supra*, and *Board of Commissioners* v. *Call*. The Circuit Court of Appeals, as we have before re-

marked, after referring to these cases in reference to the said sections, said: "With these decisions of the Supreme Court of North Carolina *we are in full accord.*"

In view of these cousiderations, we submit that the answer to these questions should be that the construction of the State Supreme Court should be followed and, therefore, the bonds in question are void, into whomsoever hands they may have come.

JAS. E. SHEPHERD,
Att'y for Board Com'rs of Stanly County.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

19450

No. 167.

Brf. of Avery for Appellants.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY *Et Al.*, APPELLANTS,

versus

W. N. COLER & COMPANY, APPELLEES.

On a Certificate from the United States Circuit Court of Appeals from the Fourth Circuit.

Brief of A. C. AVERY, Counsel for Appellants.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

No. 471.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY *Et Al.*, APPELLANTS,

versus

W. N. COLER & COMPANY, APPELLEES.

On a Certificate from the United States Circuit Court of Appeals from the Fourth Circuit.

Brief of A. C. AVERY, Counsel for Appellants.

The certificate of Circuit Court Judges is as follows:

Upon the hearing on the Circuit, the decree, as above set out, was entered in favor of the complainants. Whereupon, the suit was taken by appeal to this, the Circuit Court of Appeals for the Fourth Circuit, before the undersigned; and said Court desiring, for its proper decision, the instruction of the Supreme Court of the United States concerning certain questions or propositions of law arising in said suit:

Now, therefore, we, the undersigned, do hereby certify said questions or propositions of law to the Supreme Court of the United States for instruction as aforesaid:

First. Whether, upon the averments of the bill of complaint, answers, replications, orders, exhibits and other

evidence, and matters and things recited herein, the Circuit Court of the United States was bound, in passing upon this case, by the decisions of the Supreme Court of North Carolina in the following cases—

Commissioners of Wilkes County *v.* Clarence Call *et. al.*, 123 N. C. Rep., 308;
Bank *v.* Commissioners, 119 N. C. Rep., 214;
Commissioners *v.* Snuggs, 121 N. C. Rep., 394;
Rodman *v.* Washington, 122 N. C. Rep., 39;
Commissioners *v.* Payne, 123 N. C. Rep., 432,

considered in connection with prior decisions of said Court, and the following provisions of the Constitution of said State:

Art. 2, secs. 14 and 16, and Art. 5, secs. 1, 4, 6 and 7, and Art. 7, sec. 7.

Second. Whether, if the bonds in coupons in question were issued, put in circulation and came to the hands of complainants, appellees, in due course of trade, for valuable consideration, and without notice, and if there were at that time no decision of the Supreme Court of North Carolina adverse to these bonds or identical bonds issued under similar statutes, the bonds held by complainants are valid bonds.

Third. Whether there was any decision adverse to the validity of these bonds or identical bonds, or any construction of the Constitution or law of North Carolina, which affected the question of their validity when they came in due course of trade and for valuable consideration and without notice, other than such notice as the parties are assumed to have of existing provisions in the Constitution and statutes of the State, of their invalidity.

THE ORIGIN OF THE CONTROVERSY WHICH GIVES RISE TO THE REQUEST FOR INSTRUCTIONS.

In *Bank* v. *Commissioners*, 119 N. C., 214, the Supreme Court of North Carolina for the first time construed and held to be mandatory a certain provision of the Constitution of that State, ratified on the 24th day of April, 1868, which is as follows:

Art. 2, sec. 14: "No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or *to allow the counties, cities or towns to do so*, unless the bill for that purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which reading shall have been on three different days, and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal."

Some other restrictive provisions of the said Constitution, which took effect on the 24th of April, 1868, and which are pertinent to the inquiries, are as follows:

Art. 7, sec. 7: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the qualified voters therein."

Art. 5, sec. 1: "The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at $300 in cash. * * * The State and county capitation tax shall never exceed two dollars on the head."

Art. 5, sec. 6: "The taxes levied by the Commissioners

of the several counties shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, *except for a special purpose and with the special approval of the General Assembly.*"

Art. 5, sec. 7: "Every act of the General Assembly *levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other.*"

IT WAS THE DUTY OF THE COURT TO PRONOUNCE THE ENABLING ACT VOID, AND IT CORRECTLY HELD THAT THE PURCHASERS OF BONDS ISSUED UNDER SUCH AUTHORITY TOOK THEM WITH CONSTRUCTIVE NOTICE.

Chief Justice Dillon, delivering the opinion of the Supreme Court of Iowa in a celebrated case, said:

"But when a law is a plain and clear violation of a constitutional provision, it is the duty of a judge so to declare, be the consequences what they may."

"Of what value, indeed, would be the boasted American idea of *securing private rights, and the rights of the minority (for it is usually the minority and not the majority that needs protection) by constitutional limitations on the power of the Legislature, i. e., on the power of the majority, if no tribunal existed to decide when the Legislature disregarded these limitations, or if the tribunal charged with this most delicate yet most important duty fails fearlessly to perform it.*"

Hanson *v.* Vernon (27 Iowa, 28), 1 Am. Rep., at page 224.

The foregoing citation is made, not to establish the admitted doctrine, that, where an act is clearly unconstitutional, it is the duty of the courts to so declare; but because the eminent judge calls attention so sharply to the duty of courts to enforce mandatory provisions inserted in the organic law for the protection of helpless minorities of

taxpayers from burdens such as the appellees are seeking to impose upon the taxpayers of Wilkes County.

The language of sec. 14, art. 2 of the Constitution was so clearly mandatory and its meaning was so obvious as to require no interpretation, and hence it had been assumed by the people of the State, and the courts were bound to assume, in the absence of affirmative proof to the contrary, that all legislators had been doing what watchful representatives did do, viz, had been careful to see that the requirements of sec. 14, art. 2 were complied with both in the mode of enacting statutes and the record entered upon the Journals.

Not only was the meaning of the language used unmistakable, and so declared to be by the Supreme Court of North Carolina; but, eight years before the bonds in controversy were issued, the Supreme Court of the United States held in a case brought up by writ of error, *not from the State Court, but from the Circuit Court of the United States*, that it was bound to follow the decisions of the Supreme Court of Illinois, interpreting and enforcing a provision in the organic law of that State similar in its nature but not so rigid in its requirements. The language of the Constitution of Illinois, which gave rise to the controversy in that case, was as follows:

"Sec. 3: Each House shall keep a Journal of its proceedings and publish them," etc.

"Sec. 21. * * * On the final passage of all bills the votes shall be by ayes and nays, and shall be entered upon the Journals, and no bill shall become a law without the concurrence of a majority of the members-elect in each House."

Sec. 14, art. 2 of the Constitution of North Carolina declares statutes of the class in question invalid unless read upon three different days and unless the Journal shows that a majority voted for their passage *both on the second and third readings.*

Sec. 16, art. 2 of the Constitution of North Carolina is as follows:

"Each House shall keep a Journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly."

In the case brought up from the Circuit Court of the Northern District of Illinois, the Court said:

"The construction uniformly given to the Constitution of a State by its highest court is binding on the courts of the United States as a rule of decision."

"An act of the Legislature of the State, which has been held by its highest court not to be a statute of a State, because never passed as its Constitution requires, can not be held by the courts of the United States, upon the same evidence, to be a law of the State."

"That which is not a law can give no validity to bonds purporting to be issued under it, even in the hands of those who take them for value, and in the belief that they have been lawfully issued."

> Amoskeag Nat. Bank *v.* Ottawa, 105 U. S., 667 (L. C. Ed. B. 26, page 1205).

That case has never been overruled or cited except with approval, and our case can not be distinguished from it, under the rule as stated in *Turner* v. *Board of Commissioners*, 173 U. S., 461, since both were brought up from the Circuit Court of Federal Districts in the manner provided by law to the proper appellate court. "The distinction, as to the authority of this court, between writs of error to the courts of the United States and writs of error to the highest court of a State," does not apply.

The case of *Amoskeag Nat. Bank* v. *Ottawa* had been cited with approval and had been followed in a number of decisions rendered before the bonds were issued, on the ... day of ....., 1890.

Claiborne *v.* Brooks, 111 U. S., 410.
Norton *v.* Shelby County, 118 U. S., 45.
Leper *v.* Texas, 139 U. S., 167.

The adjudication, in *Amoskeag Nat. Bank* v. *Ottawa, supra*, followed two previous rulings, where actions had been brought up by writ of error in the same way and *from the same Circuit Court, and involving a construction of the same constitutional provision.* In rendering the opinion in these two cases Justice Bradley used strong language, to which the attention of the Court is especially invited:

"If, therefore, *the law in question had never been passed upon by the State courts, the courts of the United States would, nevertheless, be bound to give to the Constitution of Illinois the same construction which the State courts give to it, and to hold a pretended act of the Legislature void and not a law* which the State Court would hold to be so. * * * But the law under consideration has been passed upon by the Supreme Court of Illinois and held to be invalid. *This ought to have been sufficient to have governed the action of the Court below.*"

South Ottawa *v.* Perkins, 94 U. S., 260 (L. C. Ed. B. 24, at pages 157, 158).
Supervisors *v.* Post, *Id.*

"Authorities are not required to support the *general proposition* that, in consideration of the Constitution or laws of the State, this Court gives the construction given to those instruments by the highest court of a State."

Wilson *v.* State, 169 U. S., 586, 592.

THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA.

When proof of a failure to comply with sec. 14, art. 2, in the enactment of an enabling statute, relied on as authority for issuing municipal bonds, was first offered on

the trial of issues involving the validity of such bonds, that Court construed the Constitution of North Carolina as Justice Bradley said the Supreme Court of the United States would have been bound to interpret a similar provision in the Constitution of Illinois, even if the courts of that State had not previously passed upon it. That Court declared that such a pretended statute was no law, in the following cases, which are cited in the order in which the decisions were rendered, to-wit:

Bank *v.* Commissioners, 119 N. C. Rep., 214.
Commissioners *v.* Snuggs, 121 N. C. Rep., 394.
Rodman *v.* Washington, 122 N. C Rep , 39.
Commissioners of Wilkes County *v.* Call *et al.*, 123 N. C. Rep., 308.
Commissioners of Buncombe *v.* Payne, 123 N. C. Rep., 432.

If the general rule prevail, therefore, the rights of the purchasers of bonds issued under such defective power were not impaired by a construction of the Constitution which followed a previous declaration of the Court, whose province it is to determine when contracts are impaired. The purchaser of such bonds took them with notice of the local laws affecting the validity of the contract, and especially with notice that the presumption of regularity in the passage of the statutes, enacted after April 24, 1868, and relied upon as authority for issuing the bonds, was rebutted by the legislative histories recorded in the Journals. Even bona fide holders of bonds issued under such defective powers have no right to recover upon them.

Brenham *v.* Bank, 144 U. S., 173, 182, 188.
Lewis *v.* Pina County, 155 U. S., 54, 58.
Merrill *v.* Montecello, 138 U. S., 673, 681, 682.
Daves County *v.* Dickinson, 117 U. S., 657.
Hopper *v.* Covington, 118 U. S., 148, 151.
Doon *v.* Cummons, 142 U. S., 376.

THE ENABLING ACTS RELIED UPON AS AUTHORITY FOR CREATING THE DEBT WILL BE FOUND IN THE PRINTED RECORD AS FOLLOWS:

1. Original charter of Northwestern North Carolina Railroad, enacted by the Constitutional Convention of 1868, March 9, 1868. (See p. 24, *et seq.*)

2. An act of the General Assembly, ratifying and confirming that charter. (See p. 27, *et seq.*)

3. Amendment of February 20, 1879, at page 39 *et seq.*

4. Amendment of March 2, 1881. (P. 31, *et seq.*)

5. Secs. 1996 to 2000 of The Code of North Carolina, at page 28.

While the appellants maintain that the ruling of the Court, that the holders of bonds are estopped from setting up any statute, except that recited in the bonds (the Act of March 20, 1879), as authority for issuing them, was correct, they contend, also, that the Court was equally free from error in holding (in *Commissioners* v. *Call*, *supra*), that neither the orignal charter nor any of the amendments thereto, nor the sections of The Code cited above, empowered the Commissioners of Wilkes County to create the debt.

THE SUPREME COURT WAS BOUND TO FOLLOW THE RULINGS IN THE STATE COURTS AS TO THESE ACTS, FOR THE REASONS—

1. That it was shown by the legislative Journals that neither of the amendatory acts—of August 11, 1868, of February 20, 1879, or of March 2, 1881—was passed in the manner prescribed in art. 2, sec. 14 of the Constitution of North Carolina.

Transcript of Journal, printed record, page 34, *et seq.*
Extracts from printed Journal of Legislature, record, page 40 (admitted to present correct legislative history by agreement of counsel, printed record, p. 34).

Judge Golf, delivering the opinion of the Circuit Court of Appeals of the Fourth Circuit, August, 1899, in the case of *Commissioners of Stanly* v. *Coler*, followed the rule laid down by the Supreme Court of the United States in *Supervisors* v. *Post*, *supra*, and *Amoskeag Nat. Bank* v. *South Ottowa*, in passing upon the validity of certain bonds, issued by Stanly County, North Carolina, and containing a recital that they were issued by authority of a certain amendment to the charter of a railroad company, which it was admitted was not enacted in accordance with the requirements of art. 2, sec. 14, of the Constitution, and recited also secs. 1996 to 2000 of The Code. (See printed record, p. 28.) The Court said on that appeal, which now awaits the decision in the case at bar: "The people of the State, in their Constitution, have expressly limited the power of their Legislature relating to taxation, and pointed out the *certain indispensable prerequisites that must not only exist as a fact, but also appear in the Journals of that* Legislature in a certain way. The Constitution thus, in plain words, clearly indicates *the way, and the only way*, that the Legislature can authorize the counties and the cities of the State to exercise the power of taxation. The entry of the yeas and nays on the last two readings must appear on the Journal in order to comply with the Constitution, and unless they do appear the bill has not become a law, and the evidence of its nullity is the Journal provided by that Constitution itself. * * * The questions raised by this appeal, and the legislation involved with the same have been directly considered by the Supreme Court of the State of North Carolina, and the decisions of that Court have been against the contention of the complainants below.

"Union Bank of Richmond *v.* Commissioners of Town of Oxford, 119 N. C., 214; 25 S. E., 966.

"Board of Commissioners of Stanly County *et. al.* *v.* Snuggs, County Treasurer, 121 N. C., 394: 28 S. E., 539.

"City of Charlotte *v.* Shephard, 120 N. C., 411; 27 S. E., 109.

"Redman *v.* Town of Washington, 122 N. C., 39; 30 S. E., 118.

"Board of Commissioners of Wilkes County *v.* Call *et. al.*, 31 S. E., 481—

"in which case it was also held that secs. 1996–2000 of The Code of North Carolina, authorizing County Commissioners to subscribe stock to a railroad company when necessary to aid in the completion of a railroad, do not include a railroad not commenced before the Constitution was adopted."

The rulings of the State's highest appellate court, that a statute is consistent with a provision of its Constitution (and upon the same principle that it is inconsistent with its organic law), is conclusive upon the Federal tribunal.

Merchants, etc., Bank *v.* Pennsylvania, 167 U. S.,112.

"It must be regarded as a settled question, that whether statutes of a Legislature of a State have been duly enacted in accordance with the requirements of the Constitution of each State is not a Federal question, and the decision of the State courts, as to what are the laws of a State, are binding upon the courts of the United States."

Leiper *v.* Texas, 139 U. S., 167.

The decision of the State Court in this case can not be reviewed unless it clearly appears that a right claimed under the Constitution, sec. 10, art. 1, has been impaired by the adjudication complained of.

Cooley Con. Lim. (6th Ed.), 20, 21, 22, and note on page 310.

Fall Brook Irrig. Dist. *v.* Bradley, 164 U. S., 112.

While it may be true that the Court will be inclined to uphold the validity of bonds in the hands of innocent purchasers, this rule does not prevail where the highest court of a State has held that the authority to create the debt does not exist. In such cases any doubt as to the existence of the power "ought to be determined against its existence."

Brenham *v.* Bank, 114 U. S., 173, 182, 188.

"The Federal Court will lean toward an agreement of views with the State Court if the question seems to them balanced with doubt."

Burgess *v.* Seligman, 107 U. S., 20.

THE ONLY EXCEPTION TO THE GENERAL RULE AS TO JURISDICTION.

The rule cited in the cases relied on by appellees to show that Federal Courts are at liberty to disregard and overrule the decision of the Supreme Court of the State is as follows:

"So where contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or where there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. *But even in such cases, for the sake of harmony and to avoid confusion, the Federal Court* will lean towards an agreement of views with the State courts *if the question seems to them balanced with doubt.*"

Burgess *v.* Seligman, 107 U. S., 20.

LATER STATEMENT OF RULE.

"The construction by the courts of a State of its Constitution and statutes is, as a general rule, binding on the Federal courts. We may think the Supreme Court of a State has misconstrued its Constitution or its statutes, but we are not at liberty to therefore set aside its judgment. That Court is the final arbiter as to such questions. In *Clairborne County* v. *Brooks*, 111 U. S., 400, 410 (28: 470, 474), it was said: 'It is undoubtedly a question of local policy with each State what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State.' See also,

"Burgess *v.* Seligman, 107 U. S., 20, 33 (27: 359, 365).

"Bucher *v.* Cheschire R. Co., 125 U. S., 555 (31, 795).

"Detroit *v.* Osborne, 135 U. S., 492 (34, 260).

"South Branch Lumber Co. *v.* Ott, 142 U. S., 622 (35, 1136).

"Kaukauna Water Power Co. *v.* Green Bay and M. Canal Co., 142 U. S., 254 (35, 1004).

"McElvaine *v.* Brush, 142 U. S., 155 (35, 971).

"Sturman County *v.* Wallace, 142 U. S., 283 (35, 1018), quoting

"Norton *v.* Shelby County, 118 U. S., 425 (30, 178); and

"Gormley *v.* Clark, 134 U. S., 338, (33, 909).

"Morkey *v.* Lake Shore and M. S. R. Co., 146 U. S., 162 (36, 925).

"Bauserman *v.* Blunt, 147 U. S., 647 (37, 316).

"May *v.* Tenney, 148 U. S., 60 (37, 368).

"Baltimore and O. R. Co. *v.* Baugh, 149 U. S., 368, 373 (37: 772, 776).

"Lewis *v.* Monson, 151 U. S., 454 (38, 265).

"Balkham *v.* Woodstock Iron Co., 154 U. S., 177 (38, 953), quoting

"Leffingwell *v.* Warren, 67 U. S., 2 Black, 599, 603 (17: 261, 262)."

"It is conceded that the judgment of the Supreme Court of Indiana in this controversy could not be reviewed by the Court on writ of error; that the questions involved and decided by that Court are not of a Federal nature, or such as to invest any appellate jurisdiction in this Court. But if this Court can not set aside such judgment on the ground of error of law *it would seem to follow that no subordinate Federal Court has the power on the same ground to strike it down.* What the highest court of the United States can not do directly would seem to be beyond the reach of a subordinate court in collateral attack. The case of *Burgess* v. *Seligman, supra*, is largely relied upon in the opinion of the Court of Appeals, but there are several reasons why that authority does not justify its action. *In the first place the decision of the Supreme Court of the State was rendered before the filing of this bill in the Circuit Court of the United States, and not as in the Burgess case after the judgment in the Circuit Court.* In the second place, the decision was upon a question of a local nature, involving the internal policy of the State, and therefore is such a decision as should be, generally speaking, recognized and followed by the Federal courts. And, thirdly, it was a final adjudication between the same parties, and should have been respected as binding and conclusive upon the principle of *res judicata.*"

Forsyth *v.* Hammond, 166 U. S., 506, 518, 619, 520 (L. C. P. Co., p. 1100).

"The existence of the two coordinate jurisdictions in the same territory is peculiar, and the results would be anom-

alous and inconvenient, but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of State Constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declaration of what the law is. But where the law had not been thus settled it is the right and duty of the Federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence."

Folsom *v.* Township Ninety-Six, 159 U. S., 611.
Douglass *v.* Pike County, 101 U. S., 677.

The case of *Gelpcke* v. *Dubuque*, 1 Wall., 175, lays down the same rule. The Court said:

"However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. 'The sound and true rule is, that if the contract when made was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation can not be impaired by any subsequent action of legislation or decision of its courts altering the construction of the law.'

"Ohio Life and Trust Co. *v.* Debolt, 16 How., 432.

"The same principle applies where there is a change of judicial decision as to the constitutional power of the Legislature to enact the law. To this rule, thus enlarged, we adhere."

That expounder of the Constitution, Justice Miller, stated the undisputed general principle in his dissenting opinion in that case as follows:

"The general principle is not controverted by the majority that to the highest courts of the State belong the right to construe its statutes and its Constitution, except where they may conflict with the Constitution of the United States, or some statute or treaty made under it. Nor is it denied that when such a construction has been given by the State Court that this Court is bound to follow it. The cases on this subject are numerous, and the principle is as well settled and is as necessary to the harmonious working of our complex system of government as the correlative proposition that to this Court belongs the right to expound conclusively for all other courts the Constitution and laws of the Federal Government.

"Shelby *v.* Guy, 11 Wheat., 361.
"McCluny *v.* Silliman, 3 Pet., 278.
"Van Rensselaer *v.* Kearney, 11 How., 296.
"Webster *v.* Cooper, 14 How., 504.
"Elmendorf *v.* Taylor, 10 Wheat., 152.
"Bank *v.* Dudley, 2 Pet., 492."

JUDGE SIMONTON ERRED IN HOLDING SECS. 1996 TO 2000 OF THE CODE (ACT OF 1868–69) TO FALL WITHIN THE EXCEPTION TO THE GENERAL RULE.

The contention that the decisions rendered before *Bank* v. *Commissioners*, 119 N. C., 214, were in conflict with it, has been sustained by no court or judge except Judge Purnell. On the other hand, neither Judge Simonton nor Judge Purnell held that The Code, secs. 1996 to 2000, had been construed differently prior to the decision in *Commissioners* v. *Snuggs*, 121 N. C., 394. But Judge Simonton, in the Stanly case in the Circuit Court, claimed for the Federal courts the right to interpret, because, as he

contended, those sections having passed as required had never been construed till after Stanly County issued its bonds in 1889, and that the Supreme Court of North Carolina placed an erroneous interpretation upon them.

THERE WERE NO PRIOR DECISIONS PLACING A DIFFERENT CONSTRUCTION UPON SEC. 14, ART. 2 OF THE CONSTITUTION.

It appears that every judge or court called upon, up to the present time, to construe art. 2, sec. 14, of the Constitution of North Carolina, has concurred in the ruling of the Supreme Court of that State in declaring its language to be mandatory, and its requirements indispensable prerequisites to the validity of any statute purporting to confer the power upon counties of creating debts outside of those for the ordinary or necessary expenses of the municipality. The ruling of Judge Purnell, that the decisions of the Supreme Court of North Carolina prior to that in *Bank* v. *Commissioners*, 119 N. C., 214, had been in conflict with it, is fully met by the discussion of that subject in the opinion of the Circuit Court of Appeals in *Commissioners* v. *Coler & Co.*, *supra*, except as to *Gatlin* v. *Tarboro*, which was not mentioned in his opinion.

The Court said:

"The contention of the appellees that there were prior adjudications of the Supreme Court of North Carolina inconsistent with the decisions of that Court in the cases of *Union Bank of Richmond* v. *Commissioners of the Town of Oxford*, and the *Board of Commissioners of Stanly County et. al.* v. *Snuggs*, *supra*, which had become rules of property, and which were overruled by those decisions, is not sustained by an analytical examination of the cases referred to, and in our opinion that Court has not, in any of the cases called to our attention, enunciated a doctrine really in conflict with its decisions in the two cases we

have last mentioned. It is true that in some instances the language used by the Court is misleading in its tendencies, and even susceptible of the said constructions so placed upon it; but a careful consideration of the cases, and of the facts to which they relate, forces the conclusion that the Court had no intention of including within the purview of its judgment bills of the character of those embraced by the provisions of art. 2, sec. 14, of the Constitution of the State of North Carolina.

"In *Carr* v. *Coke*, 116 N. C., 243, the Supreme Court held that the certificates of the presiding officers is conclusive that the bill has passed, but that the case does not decide that such certificate is proof that the yeas and nays were entered upon the Journal; that question was not then before the Court, and that decision should be considered in the light of the facts under which it was written.

"In *Broadnax* v. *Groom*, 64 N. C., 244, the matter discussed and decided had reference to art. 2, sec. 12, of the Constitution, which is in the following words: 'The General Assembly shall not pass any private law, unless it shall be made to appear thirty days' notice of application to pass such a law shall have been given under such direction and in such manner as shall be provided by law.' The question was whether the courts would go behind the signatures of the presiding officers in order to ascertain if certain preliminary matters had been complied with, and the result reached was that the courts would presume that the Legislature had ascertained that the notice required had been given, and that the certificate of the presiding officers must be regarded as conclusive of the subject.

"The case of *Scarborough* v. *Robinson*, 81 N. C., 236, relates to art. 2, sec. 23, of the Constitution, which reads as follows: 'All bills and resolutions of a legislative nature shall be read three times in each House before they pass into law, and shall be signed by the presiding officers of

both Houses.' The question was if the proper construction of said section would admit of the enforcement, as a law, of a bill which had passed both Houses of the General Assembly, but had not been signed by the presiding officers. The decision was that such a bill was incurably defective.

"In *State* v. *Patterson*, 98 N. C., 660, 4 S. E., 350, the Supreme Court construed art. 2, sec. 21, which is as follows: 'The style of the acts shall be, The General Assembly of North Carolina do enact.' Judge Merrimon, in delivering the opinion of the Court, said: 'More particularly for the present purpose when the Constitution prescribes and directs, in terms or by necessary implication, that a particular power shall be exercised in a specified way, or a particular thing shall be done by a particular coordinate branch of government (as the Legislature), or by a particular officer or class of officers, and prescribes the way and manner of doing it, such direction can not be disregarded. A due observance of it is essential, because the Constitution so provides, and its provisions are not in vain or of trifling moment. It is not the nature of constitutions of governments to provide non-essentials—useless, unimportant details, such as may be disregarded and dispensed with. As we have said, they are organic, made upon solemn consideration by the sovereign authority, and contain general, essential provisions. Details are avoided in them, unless deemed important—essential. Non-essential details are left in the discretion of those who exercise and administer the powers of government. If this were not so, why prescribe the way and manner? Why not leave these things to convenience, and the authority charged with the exercise of the power? Why direct them? Why restrict them? And if such directions may be disregarded, ignored, suspended in some respects, then to what extent, and in what respect? If one coordinate branch of the govern-

ment, or any class of officers, may do so, why may not another, and all, as to duties devolved upon them, respectively, directly by the Constitution? The answer to these and like questions must be that requirements of the Constitution shall prevail and be observed; and when it prescribes that a particular act or thing shall be done in a way and manner specified, such direction must be treated as a command, and an observance of it essential to the effectiveness of the act or thing to be done. Such act can not be complete, such thing is not effectual until done in the way and manner so prescribed.'" "This case was decided December 5, 1887, and indicated clearly the absolute necessity of a strict observance of all the requirements of the Constitution in the matter of enactment of laws, and is in entire harmony with the later decisions of that Court, now the subject of criticism by counsel in connection with the question under consideration.

"The case of *Field* v. *Clark*, 143 U. S., 649, is not in conflict with the conclusion we reach. The particular subject we dispose of was specially pretermitted by the Court in that case, as follows: 'In regard to certain matters the Constitution expressly requires that they shall be entered on the Journal. To what extent the validity of legislative action may be affected by the failure to have those matters entered on the Journal we need not inquire. No such question is presented for determination. But it is clear that, in respect to the particular mode in which, or with what fulness shall be kept the proceedings of either House relating to matters not expressly required to be entered on the Journal, * * * these and like matters were left to the discretion of the respective Houses of Congress.'"

DIVISION OF STATE COURT DOES NOT ALTER THE BINDING EFFECT OF THE STATE DECISIONS.

Williams *v.* Eggleston, 170 U. S., 304 (L. C. Ed., book 42, p 1047).

Hence the dissenting opinion of Faircloth, C. J., in *Bank* v. *Commissioners*, 119 N. C., 214, is not authority to establish the proposition that there had been previous decisions of the Court inconsistent with the ruling in that case.

THE RULING THAT THE CODE OF NORTH CAROLINA, SECS. 1996 TO 2000, DID NOT AUTHORIZE THE CREATION OF THE BONDED DEBT OUGHT TO BE FOLLOWED BY THE FEDERAL COURT—

1. Because that ruling follows older decisions of the Supreme Court of North Carolina, rendered before the bonds in controversy were issued, and is in line with subsequent decisions, construing and applying secs. 1, 6 and 7 of art. 5 of the Constitution, which have already been quoted, but will be reiterated below for the purpose of comparing The Code provision with sec. 23, chap. 174 of the Laws of 1885, which was construed nearly five years before the bonds were issued in

Barksdale *v.* Commissioners, 93 N. C., 473, 486, 487.

Sections 1996 to 2000 of The Code are as follows:

Sec. 1996.

"The Boards of Commissioners *of the several counties shall have power to subscribe stock* to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest."

Sec. 1997.

"The Board of Commissioners of any county proposing to take stock in any railroad company shall meet and

agree upon the amount to be subscribed; and if a majority of the board shall vote for the proposition, this shall be entered of record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the Board of County Commissioners. And if a majority of the qualified voters of the county shall vote in favor of the proposition, *the Board of County Commissioners, through their chairman, shall have power to subscribe* the amount of stock proposed by them, and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company or companies: *Provided*, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or moneys, as they may think proper."

Sec. 1998.

"All election ordered under the preceding section shall be held by the sheriff under the laws and regulations provided for the election of members of the General Assembly. The votes shall be compared by *the Boards of County Commissioners*, who shall make a record of the same."

Sec. 1999.

"In case *the county* shall subscribe the amount proposed in bonds, *the Board of Commissioners shall have power* to fix the rate of interest, not to exceed the rate of 8 per cent, when the interest on said bonds shall be payable, and at what place; and shall also fix the time and places of paying the interest, and shall also determine the mode and manner of the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds."

Sec. 2000.

"The taxes authorized by the three preceding sections, to be raised for the payment of interest or principal, shall be collected by the *sheriff in like manner as other State taxes*, and be paid into the hands of the County Treasurer, to be used by the chairman of the Board of County Commissioners as directed by this chapter."

On the 11th of March, 1885, an act was ratified, which is published as chap. 174 of the Laws of 1885, sec. 23 of which act is as follows:

"Sec. 23. Sec. 2590 of The Code is amended to read as follows: 'If the tax levied by the State for the support of the public schools shall be insufficient to maintain one or more schools in each school district for the period of four months, then the Board of Commissioners of each county shall levy annually a special tax to supply the deficiency for the support and maintenance of said schools for the said period of four months or more. The said tax shall be collected by the sheriff in money, and he shall be subjected to the same liabilities for the collection and accounting of said tax as for other taxes. The said tax shall be levied on all property, credits and polls of the county; and in the assessment of the amount on each the commissioners shall observe the constitutional equation of taxation; and the fund thus raised shall be expended in the county in which it is collected, in such manner as the County Board of Education may determine, for maintaining the public schools for four months at least in each year."

The pertinent sections of art. 5, above mentioned, are as follows:

"Section 1. The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at $300 in cash. * * * The State and county capitation tax combined shall never exceed two dollars on the head."

"Sec. 6. The taxes levied by the commissioners of the several counties shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, *except for a special purpose and with the special approval of the General Assembly.*"

"Sec. 7. Every act of the General Assembly *levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other.*"

At the October Term, 1885, of the Supreme Court of North Carolina, and nearly five years before the bonds were issued, the Supreme Court of North Carolina construed sec. 23, chap. 174 of the Laws of 1885, and declared that it was insufficient to authorize the Board of Commissioners of Sampson County to levy a special tax, in order to raise a fund sufficient to maintain the public schools in said county for four months in the year. Although it was provided in the State Constitution that "one or more public schools shall be maintained at least four months in every year, and, if the commissioners of any county shall fail to comply with the aforesaid requirement of this section, they shall be liable to indictment" (art. 9, sec. 3), the Court held that a levy under the Act of 1885 for such purpose was unauthorized. The said statute is copied above.

The general power is given in The Code (sec. 1996) to "the Boards of Commissioners of the several counties", in the Act of 1885 to "the Boards of Commissioners of each county." The Code empowers "the Board of Commissioners" (after authorizing it to fix rate and interest, time of payment of bonds, etc.), *to raise by taxation from year to year the amount necessary to meet the interest on said bonds* (sec. 1997). The Act of 1885 provides that "the Boards of Commissioners of each county *shall levy annually a special tax to supply the deficiency for the support and maintenance of said schools for said period of four months or more.*" Sec. 2000 of The Code provided that the

taxes should be collected "in *like manner as the State taxes*" (which are paid for the most part on property, including credits and polls of the county). The statute provides for a levy on "property, credits and polls of the county."

THE STATUTE HELD UNCONSTITUTIONAL BY THE SUPREME COURT OF NORTH CAROLINA IN BARKSDALE V. COMMISSIONERS, 93 N. C. 472, 475, IN THE YEAR 1885, IS SUBSTANTIALLY SAME IN TERMS AS THE CODE, SECS. 1996 TO 2000.

The Supreme Court of the State, passing upon the constitutionality of the words of the Act of 1885 (chap. 174, sec. 23), containing essentially the same provisions as the sections of The Code—said (*Barksdale* v. *Commissioners*, *supra*, at its October Term, 1885):

"The levy finds no support in sec. 6, art. 5, for this is not one for '*a special purpose* and with the *special* approval of the General Assembly' for *county purposes*. The enactment is, in general, *applicable to the whole State*, and part of the general State legislation in furnishing facilities for the education of its people. *It can not find shelter* under any of the numerous adjudications sustaining the power to tax beyond the assigned restraints, and in disregard of the established ratio between State and county taxation, which will be found at the foot of the section":

"This form of taxation is local as well as special, and such has been the legislative interpretation of this clause in the frequent cases in which a special approval has been asked and obtained.

"Broadnax *v.* Groom, 64 N. C., 244.
"Simmons *v.* Wilson, 66 N. C., 336.
"Mauney *v.* Commissioners, 71 N. C., 486.
"Trull *v.* Commissioners, 72 N. C., 288.
"French *v.* Commissioners, 74 N. C., 692.
"Cromartie *v.* Commissioners, 87 N. C., 134."

"These cases settle the extent of the taxing power when exercised by the county authorities, and allow its restraints only to be disregarded when the tax is needed to meet obligations existing before the Constitution by virtue of the Constitution of the United States, etc. * * * But as the repugnance of the provisions under consideration is manifest, the commissioners must refrain from assessments, however necessary for schools, which pass the bounds of conferred power." The language which the Court said would be found at the foot of the section is: "except for a *special purpose* and *with the special approval* of the General Assembly."

The authority to levy a tax was conferred in the Act of 1885 upon "the Board of Commissioners of each county"; and this was held unconstitutional, not because *it appeared, whether the tax would exceed the limit, but* because it *was not special* in *pointing out the specific county*, nor *local* in *confining the authority to a specific municipal* corporation or county, so that the representatives of the community affected would have notice. Did not every purchaser of a bond issued in 1890 have notice of this decision as a part of the laws of the State? It recited the sections of The Code, where the authority purported to be given to "the commissioners of the several counties" to subscribe and to the "Board of Commissioners of any county" to order an election, followed by sec. 1999, purporting to vest the power to levy a tax for schools (not for the ordinary expense of the counties)—a tax which the Legislature could not delegate the authority to levy without a valid provision in the statute granting the right to levy

Cons. Lim., art. 5, sec. 7.

In *Board of Education* v. *Commissioners*, 111 N. C., 579, the Court again construed sec. 23, Laws of 1885, and adhered to the older ruling. The Court said, at page 580:

"It appears from an examination of the authorities that no case has ever come before the courts involving the exercise of this *special power* of taxation by the counties, except *upon special* or *private acts* for local objects, *until the Act of 1885 was brought* to our attention." It thus appears that the Court has constantly and persistently construed sec. 6, art. 5 of the Constitution in the same way.

In the same opinion (111 N. C., at p. 580) the Court said: "It is well settled, that for the *ordinary expense* of the government, both State and county, the first section of art. 5 of the Constitution places the limit of taxation and preserves the equation between capitation and property."

In *Board of Education* v. *Commissioners*, 107 N. C., 110, 113, Chief Justice Merrimon, for the Court, said: "And moreover, the several counties can levy taxes to meet the *ordinary expenses of the county government* within the limitation of taxation mentioned." The utmost latitude allowed by the Court in the enactment of these laws providing for the levy of taxes above the constitutional limit or for other purposes than the ordinary expenses of the counties, is, that the Legislature is not bound under the ruling in *Broadnax* v. *Groom*, 64 N. C., at page 248 (which has been discussed in another connection) "*to set out the precise sum*" to be raised by the levy.

In *Vaughan* v. *Commissioners*, 117 N. C., at page 434, the Court said: "It is within the province of the courts to determine what are necessary public buildings and what classes of expenditures fall within the definition of necessary expenses of a municipal corporation."

Satterwaite *v.* Commissioners, 76 N. C., 154.

The terms "ordinary" and necessary expenses are thus used to mean the same thing.

In the case of *Commissioners of Buncombe County* v.

Payne, 123 N. C., at page 488 (after referring to art. 5, sec. 6, of the Constitution): "A general act authorizing any and all counties to issue bonds for railroad purposes would be invalid, especially when (as is the case here) it is necessary to exceed the constitutional limitation to pay interest or principal."

Tate *v.* Commissioners, 122 N C., 812 (at p. 815).
Herring *v.* Dixon, *Id.*, 420 (at p. 424).

Barksdale's case did not depend upon the question whether the limit would be exceeded in any given case. It was held sufficient, as in our case, that it might become necessary to exceed it.

In *Tate* v. *Commissioners* the Court said (referring to older adjudications cited in *Herring* v. *Dixon*, *supra*): "For other purposes than necessary expenses a tax can not be levied either within or in excess of the constitutional limitation except by a vote of the people under special legislative authority."

It is provided in art. 7, sec. 7, of the Constitution, that "no county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officer of the same, except to meet the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein."

These adjudications had established as the settled construction of the Constitution of North Carolina by its highest court before July 1, 1890:

1. That no debt could be created by a county, except for its "necessary" or, what was *declared to be synonymous*, its "*ordinary*" expenses.

2. That a subscription to the capital stock of a railway company, like a levy for schools, is not an ordinary or necessary county expenditure.

3. That a tax levied to meet a bonded debt, created by such subscription, is a special tax, the levy of which is imperatively required by sec. 7, art. 5, to be provided for in the act authorizing the creation of the debt, and which, under the mandate of art. 5, sec. 6, *supra*, can not be *imposed without express authority specifically conferred on a particular county or other local agency of the State.*

LATER DECISIONS OF THE SUPREME COURT OF NORTH CAROLINA CONSTRUE ART. 5, SECS. 1, 6 AND 7 IN THE SAME WAY.

The construction placed upon those provisions of the Constitution in *Barksdale* v. *Commissioners*, *supra*, was overlooked by Judge Simonton in his opinion in the Circuit Court, though called to his attention in the argument. After Judge Simonton had overruled the opinion of the Supreme Court, delivered by Justice Montgomery, in *Commissioners* v. *Snuggs*, 121 N. C., 394, 400, 401 *et seq.*, as to the interpretation of secs. 1996 to 2000 of The Code, the Supreme Court of North Carolina saw fit in a subsequent decision, construing the same sections, to place their ruling upon the further ground that such general acts did not authorize the creation of the debt or the levy of the tax, and were therefore void.

At the session of the Court in which the Wilkes County bonds were declared invalid, in *Commissioners* v. *Call*, 123 N. C., 308, in passing upon the question whether those sections authorized the creation of the bonded debt of Buncombe County, the Court said:

"*A general act authorizing any and all counties to issue bonds for railroad purposes would be invalid*, especially when it is necessary to pay interest or principal.

"Tate *v.* Commissioners, 122 N. C., 812 (at p. 815).

"Herring *v.* Dickson, *Id.*, (at p. 424)."

Commissioners *v.* Payne, 123 N. C., 488.

THE FEDERAL COURTS ARE BOUND TO FOLLOW THE RULING OF THE APPELLATE COURT OF THE STATE AS TO WHAT WERE ITS DECISIONS AT A SPECIFIED TIME.

The authorities already cited, especially *Amoskeag Nat. Bank* v. *Ottawa*, *supra*, and *Leiper* v. *Texas*, *supra*, established the proposition that the Federal courts are bound to accept the ruling of the highest State Court, as to what are, or what are not, statutes in force or valid statutes of the State. Upon the same principle the Federal courts must accept as true the judicial declaration of the highest court of a State as to what was its ruling upon a particular point at a specified time. The laws of comity, as well as reason and public policy, forbid that the Supreme Court of the Federal Government should say in its opinion, overruling the State tribunal, "you thought you knew what you had decided, but you are mistaken."

The Supreme Court of North Carolina held, in *Barksdale* v. *Commissioners*, at the October Term, 1885, that a general act almost in *totidem verbis* with The Code provision, secs. 1996 to 2000, was unconstitutional and void, for failure to meet the requirements of art. 5 of the Constitution. This ruling was made five years before the bonds in controversy were issued. Eight years after they were issued, in passing upon the question whether these provisions of The Code authorized the issue of bonds, the Court, in *Commissioners* v. *Payne*, 123 N. C., 488, declared that any such act was "*invalid*," not simply as authority for levying a tax, but as "*authorizing * * * all counties to issue bonds for railroad purposes.*" If the Federal courts assume that the State Court knew what its own decisions were, they must conclude that it is the "settled decision" of that Court that general statutes, like those under consideration, are in conflict with its Constitution. This being a question that "relates to the internal Constitution of the

body politic of the State," the ruling of the State Court must be followed.

Claiborne *v.* Brooks, 111 U. S., 410.

It having been decided by the State Court that such statutes are invalid unless both "*local and special*," we take it for granted that even the eminent counsel will not be heard to discuss the questions whether this settled line of decisions, which was the *lex loci contractus* when the bonds were issued, is "sound in principle."

THE RULING AS TO THE SECTION OF THE CODE SHOULD BE FOLLOWED ALSO BECAUSE IT FOLLOWED A PRIOR DECISION CONSTRUING A SIMILAR PROVISION IN THE CONSTITUTION IN REFERENCE TO STATE SUBSCRIPTION TO THE STOCK OF RAILWAY COMPANIES, IN GALLAWAY V. CHATHAM R. COMPANY, 63 N. C., 147, 155, 156.

Constitution of North Carolina—"Art. 5, sec. 4. Until the bonds of the State shall be at par the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, *unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power* to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of the Constitution, or in *which the State has a direct pecuniary interest*, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

Judge Purnell erroneously held that the case cited (*Gallaway* v. *Railroad*) was overruled by *Bank* v. *Commissioners, supra.*

That action was brought to test the validity of a sub-

scription provided for in an act passed after the ratification of the Constitution, on April 24, 1868.

After referring to all of the restrictive clauses of the Constitution (among them to art. 2, sec. 14), and declaring that the evil intended to be remedied was the creation of State indebtedness (1) by subscribing to the stock of railroad and navigation companies; (2) by exchanging State bonds for bonds of such corporations; (3) by indorsing the bonds of such corporations and making a mortgage or some other collateral security for indemnity, Chief Justice Pearson (at p. 155 of 63 N. C. R.) said:

"The suggestion that the credit of the State was given by this statute to aid in the completion of an *unfinished railroad* was not strongly urged on the argument, and, indeed, it could not be. An unfinished road is one that has been begun, and partly worked on, and such a road is made an exception, on the ground that it might be proper to finish it in order to prevent a sacrifice of the work that has been done. There is no evidence that such was the fact in regard to this road.

"The other suggestion, that the State has a direct pecuniary interest in this road, was properly abandoned. The word *has* is in the present tense; the exception is obviously confined to roads in which the State had a *direct pecuniary interest at the time of the adoption of the Constitution;* otherwise the State might, by a *subscription of stock, become directly interested in every railroad or navigation scheme that should thereafter be projected; and thus the restrictions of the Constitution would be of no effect whatever.*

"Our opinion is that the *statute under consideration is void, and that the General Assembly had no power to pass it without* submitting the subject to a vote of the people.

"In making this decision we are relieved in some measure from our feeling of responsibility by the fact that if

the public interest imperiously calls for the construction of this road the Constitution provides that it may be done if such be the will of the people."

THE WILKESBORO LINE WAS NOT AN UNFINISHED ROAD.

The construction of the Wilkesboro line was first specially provided for in the Act of February 20, 1879. (See sec. 1 of that statute, p. 29 of printed record.) Before that time the original company had only general authority to build from Greensboro to Winston and to some point on the Virginia line. In passing upon the question whether it was an unfinished road the Supreme Court of North Carolina said (in *Commissioners* v. *Call*, 123 N. C., bottom p. 324):

"It is not necessary for us to consider the fact that the first section of the road had been completed to Winston, beyond which all idea of extension seems for years to have been abandoned. This branch was an unfinished road then only in the sense, as was said by Rodman in his concurring opinion in *Gallaway* v. *Chatham R. Co.*, *supra*, that "It had never been begun."

Justice Rodman, concurring, said:

"The Chatham Railroad, *between the termini and the route established by previous legislation*, was an unfinished road in the legislative meaning of the phrase; but the road which was to start from one of the termini of the Chatham Road, or from some point on it, and thence run to Cheraw, was a road which was unfinished in the sense that it had never been begun, but not in the sense contemplated by the Constitution, which meant only to include those roads which *had been begun, but were unfinished at its adoption*. We are obliged to give this meaning *to that phrase in the Constitution, as any other construction would render it totally ineffective, and defeat any policy which it may be supposed it was* intended to enforce."

Discussing this subject Justice Douglas said:

"If the word 'uncompleted' can refer to any road *not yet begun*, and the word 'interest' applied on mere friendly feeling or supposed advantage to be derived from the general building up of the country, then the *several counties may go on forever subscribing unlimited amounts to any railroad in esse or in futuro that may be located within the range of their knowledge. Such a construction would simply nullify the Constitution, by making its explicit restrictions vain and worthless.* It can not be adopted by us, but, if we were forced to adopt it we would equally be forced *to declare those sections null and void.* If they mean that, they have no place upon the statute books. *While the Legislature may, in individual cases, grant to specific counties the necessary authority in accordance with the provision of the Constitution and subject to its restrictions, it can not by a sweeping act of unlimited application utterly destroy its operation.* If the Legislature or the railroad company or the county had placed any such construction upon these sections, additional legislation would have been deemed useless, and the recital in the bonds would have been different. It is true that this road *had been begun* and was in one sense *uncompleted when the subscription was* made, but it was *not begun when the Constitution was ratified*, and the *county at that time had no pecuniary interest in it nor* any interest contemplated by the statute."

Commissioners *v.* Call, 123 N. C., at page 324.

It thus appears that the ruling of the Court rested upon the view, first, that such statutes as the Act of 1869 brought forward in The Code were invalid, as was held in Barksdale's case and in *Commissioners* v. *Payne*, *supra*, unless they applied in terms to specific counties and particular corporations; second, that the branch from Win-

ston to Wilkesboro was a line not begun when the Constitution was ratified, on April 24, 1868, though work may have been done before that date between Greensboro and Winston, because any other construction would leave a loop-hole for extending privileges to any new road chartered after 1868, if made to connect with an old line and called a branch of the line begun before that day.

THE CONSTRUCTION PLACED UPON THE CODE SECTIONS BY THE COURT SHOULD BE FOLLOWED BECAUSE IT IS REASONABLE. —"INTEREST" DEFINED.

An interest generally is a legal concern of a person in a thing or in the conduct of another person, whether it consists in the right of enjoyment of or benefit from property, or right to claim an advantage or be subjected to liability on account of the conduct or management of property.

In other words, an interest is either a legal right in a thing as property, or such a relation to it as to enable one to participate in the profits of its conduct or management or share in the loss arising from its managemnent.

INTEREST MEANS PECUNIARY INTEREST.

The Code sections could not apply to the present case, because the Yadkin Railway Company had not begun to construct the Wilkesboro branch of its road, and had not located said branch until long after the ratification of the Constitution of 1868. The words "direct pecuniary interest" have been construed by the Court in *Galloway* v. *Railroad*, 64 N. C., at pages 155, 156 and 158. The Court, in *Commissioners* v. *Snuggs*, *supra*, construed sec. 1996 of The Code to refer only to a direct pecuniary interest in a road unfinished in 1868, when the act was first passed. Authorities from many courts can be cited to show that the word "interest" in such a connection as used in that section implies, *ex vi termini*, a pecuniary interest, which it

must be conceded the county of Wilkes did not have in 1887 to 1889.

Taylor *v.* Norment, 88 Ill., 527.
McGrath *v* People, 100 Ill., 464.
Wilson *v.* Railroad, 67 Ala., 358, 360.
In re Estate of White, 37 Cal., 100.
Shelton *v.* Derby, 27 Cown , 414, 421.
Smith *v.* Phillips, 54 Ala., 8.
Phillips *v.* Smith, 62 Ala., 578.
Lenter *v.* Almeda County, 45 Cal., 7.
State *v.* Eastern R. C., 36 N. J. L., 184.
Shelton *v.* Derby, 27 Conn., 415—425.

The contract was made in contemplation of the decision in *Gallaway* v. *Railroad*, *supra*, which the Court in *Commissioners* v. *Snuggs*, *supra*, had construed similar language in the Constitution, and that the Act of 1868 was intended to restrict counties as the State was restricted to roads unfinished on April 24, 1868, when it is not pretended that work had been begun on the line. But the Court say that interest means pecuniary interest, and in that respect its construction is in accord with the current of authority elsewhere.

Supposing, then, that the commissioners had relied solely upon this view, would the Supreme Court treat the State Court with so little consideration as to say that the question is not even balanced with doubt? True we do not think it is necessary to pass upon that construction, because the statute as held in *Commissioners* v. *Payne*, 31 S. Rep., following *Barksdale* v. *Commissioners*, fails to meet the demands of sec. 6, art. 5 of the Constitution.

THE COURT IS BOUND TO FOLLOW THE RULING IN COMMISSIONERS V. CALL, 123 N. C., 308. THAT THE COUNTY WAS NOT AUTHORIZED TO CONTRACT TO PAY THE BONDS BY THE ORIGINAL CHARTER OF MARCH 9TH, 1868. IT WAS ESSENTIAL THAT A VALID ENABLING ACT SHOULD HAVE BEEN PASSED AFTER APRIL 24TH 1868.

The authority conferred by the charter became nugatory as to any contract of subscription made by municipal corporations after the 24th of April, 1868, and also as to contracts not completed at that date.

Norton *v.* Brownville, 129 U. S., pages 479 to 493.
Aspinwall *v.* Commissioners, 22 Howard, 364.
Wadsworth *v.* Supervisors, 102 U. S., 534–553.
Railroad *v.* Faulkiner, 103 U. S., 821.
Faulkiner *v.* Railroad, 69 N. Y., 491 (cited in Norton *v.* Brownville, *supra*, at p. 490).
Town of Louisville *v.* Portsmouth, etc., Bank, 104 U. S., pages 469–479.

"These cases (said Chief Justice Fuller, in *Norton* v. *Brownsville*, *supra*, referring to *Concord* v. *Portsmouth Savings Bank*, 92 U. S., 625; *Falconer* v. *Railroad*, *supra*; *Railroad* v. *Falconer*, *supra*: *Wadsworth* v. *Supervisors*, 102 U. S., 534–537; and *Aspinwall* v. *Commissioners*, 22 Howard, 364), sufficiently illustrate the distinction between the operation of a constitutional limitation upon the power of the Legislature, and a constitutional inhibition upon the municipality itself. In the former case past legislation is not necessarily affected, while in the latter case it is annulled." This was said in construing a provision in the Constitution of the State of Tennessee, substantially the same as sec. 7, art 7 of the Constitution of North Carolina, ratified April 24, 1868. If the inhibition contained in art. 7, sec. 7, in sec. 14, art. 2, and in art. 5, secs. 6

and 7. were self-executing and operated directly upon the counties, then it is clear that on the 24th of April, 1868, the charter granted by the Constitutional Convention on the 9th of March, 1868, was nugatory as authority to the Board of Commissioners to create a bonded debt in the face of the first two inhibitions as well as for the reason that the subscription involved the levying of a tax not "for county purposes" (held to mean the "ordinary expenses" of the county), but for "a special purpose," which required a new act granting "the special approval of the General Assembly," which must be both "local and special" in its application.

Barksdale *v.* Commissioners, 93 N. C., 472–475.

THE SUPREME COURT OF NORTH CAROLINA HOLD THAT THE CHARTER, IF THE POWERS GIVEN IN IT HAD NOT BEEN REVOKED ON THE RATIFICATION OF THE CONSTITUTION OF 1868, DID NOT BY ITS TERMS CONFER AUTHORITY ON WILKES COUNTY TO SUBSCRIBE TO THE CAPITAL STOCK OF THE RAILROAD COMPANY.

BOTTOM OF PAGE 312, *et seq.*

"But is is urged that while the bonds were expressly issued under the Act of 1879, there was, apparently unknown to both parties to the transaction, and certainly ignored by them, an existing authority to issue said bonds derived from an ordinance of the Constitutional Convention, passed in 1868; and that, therefore, we should hold that these bonds were unwittingly issued under that ordinance, and are therefore valid. The only authority we can find in that ordinance in any way authorizing the subscription to the stock of the company or the issuing of the bonds, is as follows:

"'Sec. 2. That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties, in shares of $100.' 'Sec. 12. Be

it further ordained, that the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the Board of Directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company.' That said ordinance can not be relied on to support the validity of the bonds at issue is apparent for several reasons: First, we do not see that any authority whatever is given or attempted to be given by either of these sections to Wilkes County to subscribe to the capital stock of this company. But it is said that sec 12, by referring to the charter of the 'North Carolina and Atlantic Railroad Company,' by which we presume is meant the Atlantic and North Carolina Railroad, chap 136 of the Laws of 1852, confers upon the different counties, through or near which the Northwestern North Carolina Railroad may run, the same authority to subscribe as was given to the counties tributary to the former company. Said section does not refer generally to the Act of 1852, nor does it profess to confer any of the powers therein granted. It simply says that those counties and towns that do subscribe 'shall do so in the same manner and under the same rules, regulations and restrictions, as are prescribed in the former act. The words 'same restrictions' are peculiarly significant here, as the Act of 1852, sec. 45, provides in express terms that 'if the said road be not completed within six years after the ratification of this act, this charter shall be forfeited. Therefore, even if the powers granted in the Act of 1852 had been given to the Northwestern North Carolina Railroad Company or the counties in its interest, sub-

ject to the 'same restrictions,' those powers would have expired by their own limitation long before their attempted exercise, 23 years thereafter. As all such powers must be strictly construed, this restrictive provision must be held to be in the nature of a limitation and not a condition subsequent. That is, the authority given to the counties to subscribe, if it ever existed, expired at the end of six years unless already exercised in such a way as to create vested rights. But it makes no difference how the power was exercised, if there was no power."

123 N. C., bottom page 318.

NONE OF THE AMENDMENTS TO THE CHARTER SUPPLIED THE POWER REVOKED BY THE CONSTITUTION ON APRIL 24TH, 1868.

The Act of February 20, 1879 (p. 29 printed record) did not supply the revoked power, because,

1. It was not passed in the mode prescribed in sec. 14, art. 2, and was therefore "no law."

Amoskeag Nat. Bank *v.* Ottawa, 105 U. S., *supra.*

2. Sec. 4 of said act (printed record, p. 29) provided "That any township or city, town, county or other municipal corporation of this State shall have power and authority to subscribe bonds and take any number of shares of capital stock of said company that a majority of the voters of such township, or city, town, county or other municipal corporation may elect to take therein." It was decided by the Supreme Court of North Carolina, as has already been stated, by a line of decisions beginning five years before and extending up to eight years after the bonds were issued, that such a general statute applying to all of the townships, cities, towns and municipal corporations of the State, did not constitute authority for creat-

ing a bonded debt by any particular corporation in order to pay for stock in a railway company.

Barksdale *v.* Commissioners, *supra.*
Commissioners *v* Call, *supra.*
Commissioners *v.* Payne, *supra.*

The authority was not conferred by sec. 3 of the Act of March 2, 1881 (printed record, p. 31),

1. Because that act was not passed in the manner prescribed by the Constitution.

2. Because the provision that "any corporation, county, city, town or township interested therein may subscribe to stock for said purpose, or otherwise contribute to such work, in such manner as shall be determined by the proper authority of such corporation, county, city, town or township, and agreed on with the said Northwestern North Carolina Railroad Company," was fatally defective in that it purported to authorize municipal corporations to pledge their faith and create debts for purposes other than for necessary expenses of a county, without first obtaining the consent of a majority of the qualified voters of such municipal corporation by submitting the question of subscription to be voted upon. The act is invalid as an attempt to confer the authority also because it failed to specify any particular municipal corporation and therefore subject to the objection that it is too general in its terms.

The Act of the Legislature of August 11, 1868 (p. 27, printed record), conferred no power on the county of Wilkes to create a bonded debt, because—

1. The extracts from the printed Journals (printed record, pp. 40 and 41), agreed by counsel to be a correct history of legislative action (p. 34 of printed record), show that the said act was not passed in accordance with the mandatory requirements of sec. 14, art. 2 of the Constitu-

tion. Any provision of said act, therefore, which purported by ratifying said act or in express terms to empower municipal corporations to create bonded indebtedness was null and void, as has been held by the Supreme Court of North Carolina, Judge Simonton, in the Circuit Court of Appeals; indeed, by every tribunal, except District Judge Purnell, in the Circuit Court at Greensboro.

2. Because it purported by its terms to ratify and confirm only "*the acts and things heretofore done under the provisions of said ordinance*," and if it had not been void for failure to pass in the prescribed way, could not operate to ratify prospectively any act of the county of Wilkes.

3. It was provided by sec. 2 of said act "That all the right, powers of authorities conferred or purporting to be conferred by said ordinance, incorporating the Northwestern North Carolina Railroad Company, on the Justices of the Peace of Forsyth County or on the CountyCourt of said county, be and the same are hereby conferred on the commissioners of said county."

THERE HAD BEEN NO DECISION BEFORE THE OPINIONS WERE FILED IN BANK V. COMMISSIONERS, 119 N. C., 214, AND IN COMMISSIONERS V. CALL, 123 N. C., 308, WHICH WERE ADVERSE TO THE VALIDITY OF THE WILKES COUNTY BONDS ISSUED IN 1890.

This case is distinguishd from *Folsam* v. *The Township of Ninety-six*, 159 U. S., 611, in that in Folsam's case it was admitted that the Supreme Court of South Carolina, after the township bonds were issued, had overruled a former decision favorable to the validity of the bonds. In our case the Supreme Court of North Carolina have reiterated the statement in all of the cases cited in the certificate, that the Court had never at any time before the bonds were issued rendered any decision in conflict with *Bank* v. *Commissioners*, 119 N. C., 214. The binding effect

of such a declaration in the opinions of the Court is not altered by the fact that a minority of the Court differed with the majority upon this question.

Williams *v.* Eggleston, 170 U. S., 304.

The provisions of the Constitution of 1868 do not apply where the contract of subscription was complete before the restrictive provisions of the Constitution became operative, on April 24, 1868.

Norton *v.* Brownesville, 129 U. S., 479, 493, and other authorities cited, *supra*.

THE SUBSCRIPTION OF FORSYTH COUNTY HELD VALID IN HILL V. COMMISSIONERS, 67 N. C., 367, AND IN BELO V COMMISSIONERS, 76 N. C., 489. WAS MADE BEFORE APRIL 24TH, 1868, AND NO EVIDENCE WAS OFFERED IN EITHER OF THOSE CASES AS WAS DONE ON THE HEARING IN THIS CASE TO SHOW THAT THE ACT OF AUGUST 11TH, 1868, WAS NOT ENACTED AS REQUIRED BY CONSTITUTION OF NORTH CAROLINA, ARTICLE 2, SECTION 14.

1. Justice Furches, in his dissenting opinion in *Commissioners* v. *Call*, 123 N. C., at page 330, said:

"It is true that the submission of this question in Forsyth was made by the justices of the peace acting as a County Court. And it is true that the charter provides that the question should be submitted by them. But this charter was passed and this submission was made and bonds issued before the adoption of the Constitution of 1868, which did not go into effect until the 22d of April of that year."

It appears that in *Hill* v. *Commissioners* the sole question raised was, whether, before the ratification of the Constitution of 1868, the Legislature had the constitutional power to authorize a subscription by a county to the capital stock of a railroad company. Justice Read said in the

opinion: "We suppose the plaintiffs' counsel felt at liberty to treat it as an open question, because, in *Caldwell* v. *Justices of Burke*, there was a dissenting opinion by the present Chief Justice; but the Court was unanimous upon the point. The dissenting opinion was only as to the power of a second vote of the people after they had rejected the proposition by a former vote."

The Court had previously quoted, in the same opinion, from *Caldwell* v. *Justices*, 4 Jones Eq., 323 (decided at the June Term, 1858, of said Court), as follows: "In accordance with these views is the case of *Taylor* v. *New Bern*, *supra* (2 Jones Eq., 141), so that the question may be said to be settled here."

It must be admitted that the attempt to enter into the contract was made before the 11th of August, 1868, so that if the statute relied on as an enabling act had not been void for failure of the Legislature to comply with the requirements of art 2, sec. 14, of the Constitution, it would have been too late to attempt to confer the power after its exercise. The Act of 1868, if it was void (as we shall presently see it was, and is), could no more operate to ratify the previous exercise of such authority than as a grant of the power to create the debt.

2. In *Belo* v. *Commissioners* the Court place the decision upon two grounds, the first being that authority was given to the Commissioners of Forsyth under the original charter construed together with the Act of 1852 therein mentioned. To grant this would not affect the question of the right of Wilkes County to contract after April 24, 1868.

The Court, however, said in that case, *Belo* v. *Commissioners*, 76 N C., at page 497:

"But the plaintiff further relies upon a subsequent act of the Legislature, ratified the 11th of August, 1868, which confirms the original charter of March, 1868. This act, in express terms, ratifies all acts and things heretofore done

under the provisions of said ordinance, and confers upon the Board of Commissioners of the county (Forsyth) full power and authority to levy from time to time such tax as may be sufficient to pay the subscription made by said county to the capital stock of the Northwestern North Carolina Railroad Company and interest due thereon, or to liquidate any debt created by the county in borrowing money to pay such stock subscriptions. * * * Declaring, as we do, that the ratifying Act of 1868 was a curative act, and validated both county subscriptions and the issue of the bonds, if any defects existed therein—and it has been one purpose of this opinion to show that the bonds were valid in the hands of bona fide holders without the aid of this healing act—and the proposed evidence of the defendant became immaterial and irrelevant. As a matter of law the bonds were valid, and the Court did not err in so declaring."

It follows from the facts stated and the authorities cited:

1. That the Act of August 11, 1868, upon proof that it was not passed in conformity to art. 2, sec. 14, of the Constitution, was void even as an enabling or curative act for Forsyth County. An act void as an attempted violation of the Constitution or of a statute can not be made valid by a second void statute purporting to cure the exercise of an unauthorized power.

Lowe *v.* Harris, 112 N. C., page 485, *et seq.*

2. That the statute purported to ratify only what had been previously done by Forsyth County, and under the strict rule of construction applicable to powers could not be held to operate prospectively on a county not named as donee of the power, and which did not attempt to exercise it till twenty-one years later, October 1, 1889.

3. That there had been no ruling by the State Court when the Wilkes County bonds were issued, October 1,

1889, that any subscription under the charter was valid, except that made by Forsyth County before the ratification of the Constitution, and which was authorized by a vote of the people on April 14, 1868 (twenty days before the ratification).

4. That if the reference to the charter of the Atlantic and North Carolina Railroad Company operated to incorporate the sections referred to into the original charter, and if it were granted also for the sake of the argument that the authority conferred did not expire by its own limitation in six years, the insuperable difficulty, which will be more fully discussed in connection with secs. 1996 to 2000 of The Code, would still remain, which is that after the ratification of the Constitution of 1868 no tax could be levied "except for a special purpose" (art. 5, sec. 6), which must be "stated in the act" (art. 5, sec. 7), and which must have been "local as well as special," viz: must have specified the municipal corporations in a particular locality which was to be clothed with the power to tax.

Barksdale *v.* Commissioners, 93 N. C., 472, 475.

A CONTRACT VOID BECAUSE UNCONSTITUTIONAL CAN NOT BE MADE VALID BY SUBSEQUENT RATIFICATION UNDER NORTH CAROLINA LAWS. CONTRACT OF A NORTH CAROLINA MUNICIPALITY—GOVERNED BY LEX LOCI CONTRACTUS.

The so-called curative Act of August 11, 1868, if it had not been enacted in the prescribed manner, and if it had by its terms purported to confirm any contract other than that made by Forsyth County, it could not, under the North Carolina decisions, have operated as a confirmation of a void contract.

The Act of August 11 does not purport upon its face to ratify any contract except that theretofore made by the county of Forsyth. The language is "and all acts and

things heretofore done under the provisions of the said ordinance are hereby ratified and confirmed." Clearly heretofore meant before August 11, 1868, when the act was passed. The Forsyth County contract having been made, not in contemplation of, but prior to, the adoption of the Constitution of 1868, may have been subject to ratification, but it is settled law in North Carolina that a void contract can not be made valid and operative by an act of the Legislature, for the reasons (1) that such an act would be judicial legislation; (2) that it would impair the obligation of any contract that would be effected by imparting validity to the void statute.

Stanmire *v.* Taylor, 48 N. C., 297.
Stanmire *v.* Powell, 13 Ired., 312.
Lowe *v.* Harris, 112 N. C., 485, *et seq.*

In *Stanmire* v. *Taylor*, *supra*, the Court said: "If the Act of 1852 (declaring plaintiff's grant valid) was intended to give life to the void grant under which the plaintiff claimed the premises by giving a construction to it, the act was a judicial one, which it was not in the power of the Legislature to pronounce. If it be considered purely a legislative grant to the lessor of the plaintiff, then it violates the contract which it made with the defendant Taylor."

It has been held by the Supreme Court of North Carolina that the Legislature of North Carolina had no power by a remedial act to make valid a contract theretofore void because attempted to be made contrary to a prohibition of the Constitution, or of a statute, such as the statute of frauds, even though the contract was voidable, not void.

Lowe *v.* Harris, 112 N. C., at pages 485, 486.

If a contract made before the incorporation of art. 2, sec. 14, into the organic law (on April 24, 1868), could have

been made valid by confirmation or supplying a defective power (which is not admitted), such a contract could not, under the rulings in North Carolina, have been vitalized by statute when entered into in defiance of a plain constitutional restriction.

If the attempted agreement to pay the bonds was void, its invalidity grew out of the disregard of the constitutional inhibition in force when they were issued. To attempt to remedy that infirmity by a curative act would be a palpable effort to evade the prohibitory provision of the Constitution, as well as an invasion of the rights of a co ordinate branch of the government by attempting to decide upon the obligations of the taxpayers of the county to pay, and of its creditors to enforce by mandamus the payment of a large bonded debt, palpably void without legislation. Would it not be as clearly void after it was resorted to?

THE SECOND AND THIRD INSTRUCTIONS ASKED FOR.

The second inquiry is hypothetical and asks the Court to assume, what is not admitted, that there were no decisions of the Supreme Court of North Carolina adverse to these or identical bonds, when they came into the hands of the complainant, appellees, in due course of trade, for valuable consideration, and without notice. The third question asks the Court to judicially determine whether there was any decision adverse to the validity of these bonds, or identical bonds, or any construction of the Constitution or laws of North Carolina, which affected the question of their validity when they came in the due course of trade and for valuable consideration, and without notice (other than such notice as the parties are assumed to have of existing provisions in the Constitution and statutes of the State) of their invalidity.

It is needless to waste time in determining what would

be the law, governing the case, if there had been no decision adverse to the validity of the bonds, if by beginning with the investigation of the third question propounded the Court shall be of opinion that the Supreme Court of North Carolina had in fact adjudicated questions upon which the validity of these bonds depended, before they were issued, and shall reach the inevitable conclusion thereupon, that all purchasers took with notice of any decisions of the Supreme Court of North Carolina which had been rendered before the contract was made and which entered into and formed a part of every such contract when made. Both of these inquiries, therefore, ought properly to be considered together.

DID A PURCHASER OF THE BONDS ISSUED IN 1890 CONTRACT IN CONTEMPLATION OF ANY CONSTITUTIONAL PROVISION, STATUTE OR DECISION OF THE SUPREME COURT OF NORTH CAROLINA, WHICH WAS SUFFICIENT TO PUT THEM ON NOTICE OF WANT OF AUTHORITY TO ISSUE THEM?

First, did they have notice that the provisions of sec. 14, art. 2 were mandatory?

The meaning of that section is an unambiguous, clear and unmistakable constitutional prohibition as to legislative actions, declaring that no law should be passed conferring certain authority upon municipal corporations except in the manner therein specifically pointed out. It is the general rule, that the use of negative words, in a Constitution or statute, is construed to indicate a legislative purpose to make its requirements mandatory, and this case does not fall within the exception to it.

24 Am and Eng. Enc. (1st Ed.), page 55, and authorities cited, n. 3.

The purchasers of these bonds had notice, when they took them, that neither the amendment of February 20, 1879, nor the amendment of March 2, 1881, nor the Act of August 11, 1868 (printed record, pp. 27 to 32), were passed in accordance with the requirements of sec 14, art. 2 of the Constitution.

> Amoskeag Nat. Bank *v.* Ottawa, 105 U. S., *supra.*
> South Ottawa *v.* Perkins, and Supervisors *v.* Post, 94 U. S., 260.

The bearing of these decisions upon the case is not affected by the fact that the validity of the Oxford bonds had been sustained on the first appeal, when no evidence had been offered below as to the manner in which the enabling act was passed, because, when the Journals were offered upon the next trial, the question was for the first time raised and for the first time adjudicated in *Bank* v. *Commissioners*, 119 N. C., 214. The same point was decided by the Supreme Court of the United States in reviewing the construction of the similar provisions contained in the Constitution of Illinois. The Court said:

"Nor is it of any importance that the Act of 1857 had been assumed to be an existing law in *Dunavan* v. *Green*, 57 Ill., 53, and *Force* v. *Battavia*, 51 Ill., 99, for in each of these cases the validity of the statute was not controverted, and by established practice of the Court no evidence of the contents of the Journals could be considered on appeal which had not been produced and made part of the case in the Court below."

> Amoskeag Nat. Bank *v.* Ottawa, 105 U. S., at page 667.

Precisely the same view of the same question was taken when art. 2, sec. 14, of the Constitution of North Carolina was first construed.

Bank *v.* Commissioners, 119 N. C., at page 220.
Gatlin *v.* Tarboro, 78 N. C., at page 128.

The case of *Bank* v. *Commissioners, supra*, had been previously heard in the Supreme Court (116 N. C., 239), but the Journals had not been offered in the first trial of the court below. At page 220, 119 N. C., the Court said: "We must take it that our former opinion settles that the town had authority to compromise a valid liability for a smaller sum, and that the Act of 1891, chap. 315, on its face authorized the election. When the second trial was had below the point was taken for the first time that, conceding, as the Court had held, that the Act of 1891, chap. 315, by its terms authorized the election, that act was invalid, because not passed as required for all acts empowering counties, cities and towns to issue bonds."

The purchasers of these bonds had notice of the following language in an opinion of the Supreme Court of North Carolina:

"More particularly for the present purpose, when the Constitution prescribes and directs, in terms or by necessary implication, that a particular power shall be exercised in a specified way, or a particular thing shall be done by a particular coordinate branch of the government (as the Legislature), or by a particular officer or class of officers, and prescribes the way and manner of doing it, such direction can not be disregarded. * * * Requirements of the Constitution shall prevail and be observed, and when it prescribes that a particular act or thing shall be done in a way and manner specified, such direction must be treated *as a command* and an observance of it *essential to the effectiveness of the act or thing to be done*." The Court decided in that case that a statute was invalid without an enacting clause, because of the following provision in the Constitution of the State, in art. 2: "Sec. 21. The style of the

act shall be: 'The General Assembly of North Carolina do enact.' "

In the same opinion the Court held also that still another section of art 2 of the Constitution was mandatory, as had previously been held in *Scarboro* v. *Robinson*, *supra*, to-wit:

"Sec 23. All bills and resolutions of a legislative nature shall be read three times in each House before they pass into laws, and shall be signed by the presiding officers of both Houses."

State *v.* Patterson, 98 N. C., 660, 662, 664.

If the commands contained in secs. 21 and 23 of art. 2 of the Constitution of North Carolina had previously been held to be mandatory, the purchaser of bonds issued in contemplation of this decision is assumed to know the law governing the construction of Constitutions and statutes, and therefore to have understood that a prohibitive provision contained in the same article of the same Constitution, in negative terms, was much more clearly mandatory, and that a little compliance with its requirements was more clearly essential to the validity of an act empowering municipal corporations to create debts.

23 Am. and Eng. Enc., *supra*.

We reiterate that according to the established rules of construction and the settled law of comity, Federal courts are bound to accept as true what the State courts say as to the status of their decision at a particular period. The question whether the contract had been impaired is determined by Federal courts upon the assumption always that the State appellate courts determines the meaning of its Constitution and laws. It follows inevitably that Federal courts must accept the declarations of the Supreme Court of North Carolina in *Bank* v. *Commissioners*, 119 N. C.,

214, that it had been already decided in *State* v. *Patterson*, 98 N. C., 660, that all of the sections of art. 2 of the Constitution of North Carolina, defining the duties of the Legislature, whether containing commands or prohibitions, were mandatory.

HAD THE SUPREME COURT HELD BEFORE THE BONDS WERE ISSUED THAT SUCH GENERAL STATUTES AS THE CODE, SECTION 1996 TO 2000, CHAPTER 136, LAWS OF 1852, SECTIONS 33, 34, 35, 36 (PRINTED RECORD, PAGE 31), AND SECTION 4, CHAPTER 13, LAWS OF 1879, WERE INVALID?

We have already seen that "a general act authorizing any and all counties to issue bonds would be invalid," under the decisions of North Carolina, rendered both before and after the bonds were issued in 1890.

Barksdale *v.* Commissioners, 93 N. C., at page 475.
Commissioners *v.* Payne, 123. N. C., 488.
Tate *v.* Commissioners, 122 N. C., 812, 813.
Herring *v.* Dickson, 122 N. C., 812, 815.

The provisions of The Code, the Act of 1852, incorporated by reference into the charter, and sec. 4, Laws of 1879, are general acts—are neither "*local*" nor "*special*"—and are therefore pronounced positively and unconditionally invalid in the cases above cited. The same doctrine is announced by Justice Douglas in passing upon the authority claimed under the original charter taken in connection with the Act of 1852, which the Court say, in a portion of the opinion already quoted, did not authorize the county of Wilkes to issue these bonds.

Commissioners *v.* Call, 123 N. C., at page 324.

THE CONSTRUCTION PLACED BY THE COURT UPON ARTICLE 5, SECTION 4, OF THE CONSTITUTION OF NORTH CAROLINA WAS ADVERSE TO THE CLAIM OF AUTHORITY TO ISSUE MUNICIPAL BONDS UNDER THE CODE, SECTION 1996 TO 2000.

Art. 5, sec. 4, of the Constitution is as follows:

"Until the bonds of the State shall be at par the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State except to supply a casual deficit, or for suppressing invasion and insurrection, *unless it shall in the same bill levy a special tax to pay the interest annually.* And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the *completion* of such railroads as may be *unfinished at the time of the adoption of the Constitution, or in which the State has a direct pecuniary interest*, unless the subject be submitted to a direct vote of the people of the State and be approved by a majority of those who shall vote thereon."

The action of *Gallaway* v. *Railroad*, 63 N. C., 147, was brought to test the validity of a subscription provided for in an act passed after the ratification of the Constitution, on April 24, 1868.

After referring to all of the restrictive clauses of the Constitution (among them to art. 2, sec. 14), and declaring that the evil intended to be remedied was the creation of State indebtedness (1) by subscribing to the stock of railroad and navigation companies; (2) by exchanging State bonds for bonds of such corporations; (3) by indorsing the bonds of such corporations and taking a mortgage or some other collateral security for indemnity, Chief Justice Pearson (at p. 155 of 63 N. C. R.) said:

"The suggestion that the credit of the State was given by this statute to aid in the completion of an unfinished

railroad was not strongly urged on the argument, and, indeed, it could not be. An unfinished road is one that has been begun, and partly worked on, and such a road is made an exception, on the ground that it might be proper to finish it in order to prevent a sacrifice of the work that has been done. There is no evidence that such was the fact in regard to this road.

"The other suggestion that the State has a direct pecuniary interest in this road was properly abandoned. The word has is in the present tense; the exception is obviously confined to roads in which the State had a direct pecuniary interest at the time of the adoption of the Constitution; otherwise the State might, by a subscription of stock, become directly interested in every railroad or navigation scheme that should thereafter be projected; and thus the restriction of the Constitution would be of no effect whatever.

"Our opinion is that the statute under consideration is void, and that the General Assembly had no power to pass it without submitting the subject to a vote of the people."

"In making this decision we are relieved in some measure from our feeling of responsibility by the fact that if the public interest imperiously calls for the construction of this road, the Constitution provides that it may be done if such be the will of the people."

The Court, in construing the provisions of The Code, which were originally passed by the Legislature of 1868, and in furtherance of the systematic plan to throw safeguards around taxpayers against the danger of improvidently subjecting themselves to the burden of municipal debts, adverted to the decision in *Gallaway* v. *Railroad*, which was cited upon the argument, as tending to show that the subscriptions provided for in The Code could only be made to railroads incomplete when the Constitution of 1868 was ratified, and in which the counties had a pecun-

iary interest. In holding that the right to subscribe was limited to such roads, if conferred at all, the Supreme Court followed not only, as we have attempted to show, the true meaning of the language used, but the construction of the Constitution containing similar language and expressive of the policy of the people of the State at that period.

THE DECISIONS IN HILL V. COMMISSIONERS, 67 N. C., 367, AND IN BELO V. COMMISSIONERS, 76 N. C., 489, ARE NOT AUTHORITY BECAUSE THEY BOTH APPLIED TO A CONTRACT MADE BY FORSYTH COUNTY BEFORE APRIL 24TH, 1868, AND BECAUSE NO EVIDENCE WAS OFFERED ON THE TRIAL OF EITHER ONE OF THOSE CASES TO SHOW THAT THE ACT OF AUGUST 11TH, 1868, UNDER WHICH THE SUBSCRIPTION WAS HELD VALID WAS NOT ENACTED AS REQUIRED BY THE CONSTITUTION OF NORTH CAROLINA, ARTICLE 2, SECTION 14.

Justice Furches, in his dissenting opinion, *Commissioners v. Call*, 123 N. C., at page 230, said:

"It is true that the submission of this question in Forsyth was made by the justices of the peace, acting as a County Court. And it is true that the charter provides that the question should be submitted by them. *But this charter was passed and this submission was made and the bonds issued before the adoption of the Constitution of 1868, which did not go into effect until the 22d of April of that year.*" (The election of 1868, upon the adoption of the Constitution, continued from the 22d to the 24th of April, and the Constitution took effect when the election was over, on the 24th. The date should have been fixed by the learned justice at April 24).

Accepting the statement in the dissenting opinion, favoring the validity of the bonds now in controversy, the contract passed on in the two cases referred to above was not

inchoate but complete when the Constitution was adopted, and was therefore not subject to any of the restrictive provisions which then took effect. In so far then as the opinion rests upon the ground that the contract made before the 24th of April, 1868, was authorized by the original charter, it has no bearing upon the question whether contracts, like that under consideration, are valid under the original charter without additional authority conferred after the adoption of the Constitution.

In so far as the decision in *Hill* v. *Commissioners* rests upon the idea that the Act of August 11, 1868, operated under the Constitution to reenact those portions of the original charter which purported to authorize subscriptions by municipal corporations, it can not be held to govern the case at bar or to effect the validity of the Wilkes County bonds, for the reason, *first*, that Justice Bynum assumed in the opinion, as there had been no evidence to the contrary offered on the trial below, that the Act of August 11, 1868, was passed in conformity with the requirements of the Constitution, and it is therefore a matter of no importance that the Court assumed that the statute was "an existing law."

> Amoskeag Nat. Bank *v.* Ottawa, 105 U. S., at page 667.

Second. That by its terms the statute purported to ratify and confirm any contract made by Forsyth County.

The same question arose as to offering the Journals in evidence when sec. 14, art. 2 was first construed by the Supreme Court of North Carolina.

> Bank *v.* Commissioners, 119 N. C., at page 220.

We have already set forth the substance of what was decided in *Hill* v. *Commissioners*, as we have also elaborated the position, that a void contract can not be made

valid under the laws of North Carolina, and, therefore, that the Legislature has no authority to give vitality to a contract void for want of conformity to the Constitution of 1868.

The burden is on the appellees to bring this case within the exception to the general rule by showing, either that the contract was made in contemplation of decisions of the State courts then in force, and which sustained its validity, but which were afterwards overruled, or second, that there was no decision construing a statute upon which its validity depended when the contract was made. We have shown that under the rulings in *State* v. *Patterson*, *supra*, in *Barksdale* v. *Commissioners*, *supra*, and, inferentially, if not directly, in *Gallaway* v. *Railroad*, the Court had passed upon provisions of the Constitution and statute, and that under those decisions purchasers of bonds had notice of the invalidity of the contract, whether the authority to make it is claimed under the one or the other of the five statutes filed as exhibits by the complainant.

If there had been no decisions, however, under the rule laid down in *Burgess* v. *Seligman*, 107 U. S., 20, the Federal courts must follow the construction placed by the highest court of a State upon its own statute, "if the question seems to them balanced with doubt." The general rule is recognized and fully stated in a number of later cases.

Forsythe *v.* Hannon, 166 U. S., 506, 518, 619, 620.

THE ATTACK UPON JUSTICE DOUGLAS IS ENTIRELY IRRELEVANT, AND INTENDED TO DIVERT ATTENTION FROM THE QUESTION AT ISSUE.

Affidavits were offered in the court at Richmond to show that a portion of a sentence incorporated in the copy of the opinion of Justice Douglas sent up, when this controversy

was brought by writ of error to the Supreme Court of the United States, was left in the opinion by mistake of the Clerk of the Court. But it is sufficient for present purposes to state that the appellants come before the Court sustained by the opinion of a majority of the Supreme Court of the State, which must be treated as the law of that State.

Williams *v.* Eggleston, 170 U. S., 304.

THE CHARGE OF COLLUSION IS LIKEWISE NOT PROVEN, BUT IS IMMATERIAL IF PROVEN.

Adams Ex. Co. *v.* Ohio State Auditor, 165 U. S., 194.

THE JURISDICTION OF THE STATE COURT SETTLED BY ITS DECISION.

It is a rule, not peculiar to the courts of North Carolina, that the Supreme Court will *ex mero motu* dismiss an appeal when it appears that the plaintiff's complaint does not state facts sufficient to constitute a cause of action.

Tucker *v.* Baker, 86 N. C., 1.
Johnson *v.* Finch, 93 N. C., 205.
Knowles *v.* Railroad, 102 N. C., 50.
McKinnon *v.* Morrison, 104 N. C., 354.

The Court here must assume that the Supreme Court of North Carolina, in entertaining *Commissioners* v. *Call*, *Commissioners* v. *Snuggs*, and *Commissioners* v. *Payne*, decided that a Board of Commissioners of a county had the right to bring suit to enjoin the treasurer of the county from paying the interest on a bonded debt of the county out of a special tax fund in his hands and collected for that purpose. But if it be necessary for a State Court to prove to a Federal tribunal that it did not err in asserting its own jurisdiction, under its own local laws, the Court is referred to a ruling of the Supreme Court of the State.

that when a treasurer makes an honest payment of taxes under an unconstitutional statute, the treasurer is not answerable personally, nor on his official bond, and the county is liable to suffer irreparable loss by such an application of its taxes.

Board of Education *v.* Commissioners, 113 N. C., pages 388, 389.

A. C. AVERY,
Counsel for Appellants.

No. 167.
Sup'e Brf. of Shepherd (Stanly Co.)
Filed Oct. 19, 1900.

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Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY, *et al.*,
APPELLANTS,
against
W. N. COLER AND COMPANY, APPELLEES,

Supplementary Brief for Stanly County.

BRIEF OF
JAMES E. SHEPHERD,
FOR COMMISSIONERS OF STANLY COUNTY.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY, *et al.*,
APPELLANTS,
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Supplementary Brief for Stanly County.

Under our view of the certificate in this case, only the general question, as to the effect of a non-compliance with the constitutional provisions as to the entry of the ayes and nays on the journals upon the rights of *bona fide* purchasers, is to be considered. As we have said, the State Supreme Court and the Federal Court of Appeals have decided that the special acts of the Legislature were void, and that a *bona fide purchaser* was bound to examine into the question of power. Inasmuch, however, as it has been suggested that questions peculiar to the Stanly County and other cases awaiting the decision of the general question referred to may in some way be discussed on the argument, we desire to say an additional word or two.

The bonds contain the following recital:

This bond "is issued by authority of an Act of the General Assembly of North Carolina, ratified the third day of March, A. D. 1887, entitled, 'An Act to amend the charter of the

Yadkin Railroad Company,' and of sections 1996, 1997, 1998 and 1999 of The Code of North Carolina, and authorized by a majority vote of the qualified voters of Stanly County at an election regularly held for that purpose on the 15th day of August, 1889, duly ordered by the Board of Commissioners of Stanly County." It is claimed that if the Act of 1887 is invalid, the holders of the bonds can still recover under the above sections of The Code.

Now the Supreme Court of North Carolina and the Federal Court of Appeals have decided that those sections related only to unfinished railroads begun before the adoption of the Constitution of 1868. There is no recital that the Yadkin Railroad was such a railroad, and there is strong authority in this Court to the effect that a mere reference to the authority, as in this case, will not estop the county from showing the required conditions were absent. Even if we are wrong in this, the case of *Belo* v. *Commissioners*, 76 N. C., 489, and the decisions cited therein from this Court, such as *Coloma* v. *Evans*, 92 U. S., 484, relied upon by counsel, would be wholly inapplicable, because *the recitals themselves show the absence of such conditions.* In other words, the recitals show *that this road was not incorporated until after the adoption of the Constitution of 1868.*

It will be noted that the bond recites that the Act of 1887 is to "amend the charter of the Yadkin Railroad Company." Of course, the purchaser is charged with notice of the original charter, which is to be amended, and this charter is referred to in the recited act as chapter 236, Acts 1870.

Thus there is not only a failure to recite the proper conditions, but *absolutely a recital to the contrary.*

The purchaser of these bonds then had notice from the recitals that this road was not commenced or even chartered until after 1868, and we confidently insist that all the arguments founded upon the line of cases like those above mentioned have nothing to do with this case. *Gunnison* v. *Rollins*,

173 U. S., 255, and cases cited. The record of the County Commissioners shows that this road was not commenced until after 1868, and indeed it is substantially an admitted fact in the case and is so found. The purchaser had notice of this, and if the special act is invalid, we respectfully insist that he can derive no support from the above-mentioned sections of The Code.

JAS. E. SHEPHERD,
Of Counsel for Stanly County.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 167.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL., APPELLANTS,

vs.

W. N. COLER & COMPANY.

SUPPLEMENTAL BRIEF FOR THE APPELLANTS.

The ruling of the supreme court of North Carolina construing article 2, section 14, of the constitution has been sustained by the circuit court of appeals in Board of Commissioners *vs.* Coler, 96 Fed. Rep., 284, and in Board of Commissioners *vs.* Union Bank, 96 Fed. Rep., 293, and Judge Simonton in the circuit court, and follows the construction by the supreme court of Illinois of almost identical language.

Supervisors *vs.* Post, 94 U. S., 260.

Post *vs.* Supervisors, 105 U. S., 667–671.

The supreme court of North Carolina declared, before the bonds in controversy were issued, on October 1, 1889, that "when the constitution prescribes and directs, in terms or by necessary implication, that a *particular power shall be exercised in a specified way*, or a particular thing done *by a particular co-ordinate branch of the government* (*as the legislature*) or by a particular officer or class of *officers, and prescribes* the way and manner *of doing it, such direction cannot be disregarded.* * * * *Such direction must be treated as a command and an observance of it essential to the effectiveness of the act or thing to be done.*"

State *vs.* Patterson, 98 N. C., 660 (decided in 1887, two years before issue of bonds on October 1, 1889).

The first decision in which article 2, section 14, of the constitution was construed was Bank *vs.* Commissioners, 119 N. C. Rep., 214.

The validity of the Wilkes County bonds and of the Buncombe County bonds was passed on at the same session of the court in the cases of—

Commissioners *vs.* Call, 123 N. C., 308.

Commissioners *vs.* Payne, 123 N. C., 432.

The decisions claimed by appellees to be inconsistent with the construction given by the court to article 2, section 14, are reviewed by Justice Clark in the opinion in Bank *vs.* Commissioners, 119 N. C., at pages 220 to 223, and Judge Goff, from the court of appeals, in 96 Fed. Rep., at page 290, where he says that the contention of the appellees was not sustained by an analytical examination of the cases referred to. A critical review will show the adjudications of the

State court, *upon a consideration* of the point involved in each case, fall under three classes:

1st. Where the statute upon its face showed that the command of the constitution had been disregarded, as by a failure to incorporate the prescribed enacting clause or the failure of the presiding officers of the two legislative houses to sign acts.

State *vs.* Patterson, 98 N. C., 660, 662, 664.
Scarboro *vs.* Robinson, 81 N. C., 409.

2d. Where there is a command or prohibition as to legislative proceedings contained in the constitution and no means provided in that instrument or by statute for preserving the evidence as to its observance or in reference to the requirement that notice shall be given of the introduction of a private act, without any provision for preserving evidence of the publication or in reference to the requirement that bills generally should be read three times, without providing, as in the enactments mentioned in article 2, section 14, that the vote should be recorded in the journals, where the doctrine *omnia presumuntur* is applied by the court.

Gatlin *vs.* Yarboro, 78 N. C., 119.
Carr *vs.* Coke, 116 N. C., 223.

3d. Where there is a command or a prohibition to do or not to do a thing and a requirement that the evidence of the proceeding shall be preserved in a particular case, as in that at bar.

Another case relied on by appellees to show inconsistent ruling is the first decision in Bank *vs.* Com'rs, 116 N. C.,

where the journals had not been offered in evidence below, as they were on the trial, giving rise to the appeal in 119 N. C., 224. In a similar case the court said:

"Nor is it of any importance that the act of 1857 had been assumed to be an existing law * * * for in each of these cases the validity of the statute was not controverted."

Post *vs.* Supervisors, 105 U. S., at p. 669.

Neither of the three amendments, act of August 11, 1868, act of February 20, 1879, and act of March 2, 1881, was passed in accordance with the requirements of article 2, section 14. (See printed Record, from bottom of page 34 to the middle of page 41, and agreement of counsel on page 34.)

The contention that the act of 1879 was passed regularly appears groundless by a reference to the record of the second reading (on page 35 of the printed record), where it appears that "as amended, the bill passed its second reading" without a recording of the vote by yeas and nays.

On the same page is the record that the bill was taken up on its third reading, and on the next page the vote on the third reading is given. It appears that the secretary of state certified that the extracts were full, but if that were not so counsel argued (Record, p. 34) that the extracts "presented a correct history of legislative action."

Appellants contend that the Second division, from Salem-Winston to Wilkesboro, was a railroad created in contemplation of the rulings in North Carolina by the act of February 20, 1879.

The original charter (section 1, page 24 of the record) for constructing a railroad with one or more tracks *from*

some point on the *North Carolina railroad between the town of Greensboro and the town of Lexington*, in Davidson county, to some *point on the northwestern boundary of the State to be hereafter determined*," in section 13 (page 27) * * * provides that the company shall have power to construct branches of said road, one of which shall run from the towns of *Winston and Salem by way* of Mt. Airy. This branch has been built, as shown on the map, to Mt. Airy from Winston-Salem, on the main line, but the point of intersection of the main line with the northwestern boundary of the State has never been determined, and the main line has never been built beyond Salem-Winston.

The second division cannot be called the main line, because its termini were absolutely fixed within the State by the act of February 20, 1879. That was not a statute fixing the northwestern terminus of the main line, but creating a new division with a different terminus.

Section 13 of the original charter is amended in act of 1879, section 1 (page 29 of the record), by adding the words "and one of which shall be constructed from the towns of Winston and Salem *up the valley of the Yadkin, by way of Jonesville and Wilkesboro*, in the county of Wilkes, to Patterson's factory, in the county of Caldwell, which branch shall be known as the Second division."

Suppose the act had provided that one line, to be known as the Second division, should be run from Salem-Winston, by way of Lincolnton, to the South Carolina line in the direction of Spartanburg, South Carolina, would it have been contended that this was the original line?

The supreme court of North Carolina before February 20, 1879, had held just such a line no part of the original line.

Where a charter was granted by the State of North Carolina to the Chatham railroad in 1861, and was amended by ordinances of the convention in 1862, and finally by the legislature in 1868, which last amendment authorized the building of a branch in the direction of Cheraw, on the South Carolina line, the court held that this branch was not an unfinished road on the 24th of April, 1868, when the constitution was ratified, though work had been before done on the original line.

Galloway *vs.* Railroad, 63 N. C., 147, 155, 157.

In the leading opinion in Galloway *vs.* Railroad, *supra*, Chief Justice Pearson said, in reference to this Cheraw branch:

"An unfinished road is one that has been begun and partly worked on, and such a road is made an exception (under article V, section 4, of the constitution) on the ground that it might be proper to finish it, in order to prevent a sacrifice of the work that has been done. There is no evidence that such was the fact in regard to this road."

Justice Rodman, concurring, in the same case, said:

"The Chatham railroad, *between the termini and the route established by previous legislation* was an unfinished road in the legislative meaning of the phrase; but the road which *was to start from one of the termini of the Chatham road, or from some point on it, and thence run to Cheraw, was a road which was unfinished in the sense that it had never been begun*, but not in the sense contemplated by the constitution, which meant only to include those roads which *had been begun, but*

were unfinished at its adoption. We are obliged to give this meaning *to that phrase in the constitution, as any other construction would render it totally ineffective, and defeat any policy which it may be supposed it was* intended to enforce."

A branch which was located as beginning "at one of *the termini* of the *Chatham road* or *from some point on it*," was not so far a part of the main line of the Chatham road as to make it an unfinished road at the adoption of the constitution on April 24, 1868, within the requirement of section 4, article V, of the constitution, and to authorize the State to take stock in it or lend it aid.

If that branch was a distinct and separate road, not a part of a main unfinished line, how could the act of 1879, locating this second line and calling it a branch, constitute it a part of the line from Greensboro to Salem-Winston, and thereby give it the advantages of a part of the line unfinished when the constitution was ratified?

The pertinent portion of article V, section 4, is as follows:

"The General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroad as may be unfinished at the time of the adoption of this constitution or in which the State has a direct pecuniary interest."

This authority will apply with still greater force (as will be presently shown) in determining whether this branch was when the act of 1868–1869 (which appears in the record, at page 28, as a part of the code re-enacted in 1883) was ratified on the -- day of ——, 1869, by the legislature elected in 1868.

If the act of 1879, *like the Cheraw act in* 1868, *created a new line, then the power to build it was conferred first on the* 20*th of February*, 1879, *and the authority to counties to subscribe therein first attempted to be given* was insufficient *and invalid because of the failure to call and record the yeas and nays on the second reading of the bill in the house of representatives* (see Record, page 35, for proceedings of the legislature and the agreement of counsel, at page 34, it having been agreed that the printed extracts presented "a correct history of legislative action," &c.).

The bonds contain the following recital:

"This bond is one of a series of one hundred bonds of the denomination of one thousand dollars each, issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, A. D. 1879, entitled 'An act,'" &c. (giving title of the act as already quoted).

Counsel for the railroad company and for the county evidently thought the act of 1879 was then the only valid authority, having failed to examine the journals.

The court, in Commissioners *vs.* Call, *supra*, held that this recital operated as an estoppel under the law of the State as interpreted by that court.

Whether the recital operated as an estoppel or not, and even if the act of 1879 did not create a new line and confine counties on that line to a claim of authority under it, there was, nevertheless, no power vested in Wilkes county on October 1, 1889, by any other known legislation, to create a bonded debt to pay a subscription for stock of the railroad company.

In Commissioners *vs.* Payne, 123 N. C., at page 188, the

court, in discussing the power of Buncombe county to issue certain bonds in aid of a railroad, said:

"*A general act authorizing any and all counties to issue bonds for railroad purposes would be void*, especially when (as in the case here) it is necessary to exceed the constitutional limit to pay principal and interest."

The court manifestly did not agree *with the learned counsel, Judge Dillon, that the inhibition upon the legislature extended only to cases where the constitutional limit of taxation should be exceeded, but did say that such a general law would be still more obnoxious where it appeared that the limit would be exceeded.* The evident meaning of the court was that, whether the proposed tax would exceed the constitutional limit or not, the statute authorizing it would come within the constitutional inhibition of section 7, article V, which provides that—

"*Every act of the General Assembly levying a special tax shall state the special object to which it shall be applied*," &c.

But when the law passed should provide for a tax in excess of such limitation it would come *in conflict also and especially* with the provisions of article V, section 6, that the tax levied by a county "*shall never exceed the double of the State tax except for a special purpose and with the special approval of the General Assembly.*"

In Commissioners *vs.* Call, 123 N. C., 312, 318, involving the validity of the very bonds in controversy in the case at bar, Justice Douglass said of the power claimed to have been given in the original charter:

"That said ordinance cannot be relied on to support the validity of the bonds is apparent, for several reasons: First,

We do not see that any authority whatever is given or attempted to be given to Wilkes county to subscribe to the capital stock of this company."

All of the acts purporting to vest authority in counties to subscribe are general.

First. The Authority of the Ordinance.

The authority contained in the ordinance is as follows:

Sec. 12. * * * (See Record, page 27.) "And that *all counties* or *towns subscribing stock* to said company shall do so in the same *manner* and *under the same rules, regulations* and *restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company.*"

All powers to corporations are to be construed strictly. Let us be mindful of that rule. Who are the donees of the power in the ordinance? The answer must be, "*All counties and towns subscribing stock to said company.*"

As was mentioned by the court in the opinion in Commissioners *vs.* Call, *supra*, the reference for the mode of proceeding on the part of a county is to the charter of the "North Carolina and *Atlantic Railroad Company.*"

No such company existed in North Carolina at the time, and counsel have offered in this case, as was done without attracting the attention of the court in Bido *vs.* Commissioners of Forsyth County, the charter of the Atlantic and North Carolina Railroad Company. This will appear by reference

to chapter 136, Laws of 1852, and comparing sections 33 *et seq.* with the exhibit on page 31 of the record.

The sections of the Atlantic and North Carolina charter relied upon provide—

"That it shall be lawful for any incorporated town or *county near or through which said railroad may pass to subscribe for such amount of stock in said company* as they shall be authorized to do by the *inhabitants* of said town or *the citizens of said county.*" (See Record, page 31.)

The framers of the constitution of 1868 clearly intended to safeguard the interests of counties by having the attention of legislators called sharply to any proposition to levy a tax upon counties represented by them. The object aimed at in article V, section 7, was to have every bill providing for the levy of a tax to so state the *special purpose* as to direct the attention of legislators to the locality where it was to operate, to make it "local" as well as "special." Another object was in consonance with the common-law idea, to identify the donee of the power attempted to be vested.

The claim of appellees is that they can describe a circle with a ~~radius~~ radius not reaching outside of the State, with Winston as a center, build branches from center to circumference on any line, and call on counties "at or near" any such line to subscribe.

It is difficult to conceive of a more general grant of power than one claimed for all of the counties at or near all of such possible branches. How could a representative of the people determine what the courts would hold "near" to mean in this connection? How could he determine under such gen-

eral grant of authority whether he was vesting power in his own constituents to create a debt?

The decisions of the supreme court of North Carolina on October 1, 1889, had established the rule that a statute levying a tax must be special as well as local, when the intention was to enforce it against particular subdivisions of the State.

In Barksdale *vs.* Commissioners, 93 N. C., 472, 475, decided at the October term, 1885, the court said:

"This form of taxation is *local* as well as *special*, and such has been the legislative interpretation of this clause in the frequent cases in which a special approval has been asked and obtained."

Broadnax *vs.* Grove, 64 N. C., 244.
Simmons *vs.* Wilson, 66 N. C., 236.
Mouney *vs.* Commissioners, 71 N. C., 486.
Trull *vs.* Commissioners, 72 N. C., 388.
French *vs.* Commissioners, 74 N. C., 692.
Cromantic *vs.* Commissioners, 87 N. C., 134.
Barksdale *vs.* Commissioners, *supra*, follows Broadnax *vs.* Groom, 64 N. C., 244.

In Broadnax *vs.* Groom the court was construing "an act to authorize the commissioners of *Rockingham county to levy a special tax* for the purpose of building and repairing bridges in said county, and two questions were decided:

1st. That the act was constitutional.

2d. That the cost of building bridges was a necessary expense, and the county authorities were authorized by law to determine the amount.

DEFINITION OF A SPECIAL FRANCHISE.

The court said:

"There is a special purpose, to wit, building and repairing bridges *in the county* of Rockingham."

The other question, whether when the journals were silent the presumption *omnia presumuntur* would apply, was directly settled in Gatlin *vs.* Tarboro, 78 N. C., 119, 123.

All of the cases cited by Chief Justice Smith in Barksdale *vs.* Commissioners show that in section 7, article 2, there is a legislative command, to wit, "Every act of the General Assembly *shall state the special object.*"

Under the rule held in State *vs.* Patterson, *supra*, obedience to this command was essential and its disregard fatal to the validity of the act.

In Barksdale case the language "except for a special purpose" was construed to require that the act should name the particular municipality—be "local" in its nature—as well as to mention the special purpose, and this was declared to have been the uniform legislative interpretation.

The command to state the special object on the statute must be obeyed.

State *vs.* Patterson, 98 N. C., 660, 662, 664.

If there is no difference between a "special purpose" and a "special object" (and we submit there is none), then it follows that a general act which does not so far define the object as to indicate the particular locality to be affected is

void for failure to comply with an "essential" requirement of the constitution.

The act of 1869 (the Code, sections 1996 to 2000) is also a general act, as held in Commissioners *vs.* Call, *supra* (see Record, page 28):

"SEC. 1996. The *boards of commissioners of the several counties shall have power to subscribe stock to any railroad company*," &c. * * *

"SEC. 1999. In case the county shall subscribe the amount proposed in bonds the board of commissioners shall have power to fix the rate of interest.

* * * * * * *

"SEC. 2000. The taxes authorized by the three preceding sections to be reserved for the payment of interest and principal shall be collected by the sheriff in like manner as other State taxes," &c.

The act declared insufficient authority in Barksdale *vs.* Commissioners, *supra*, contains substantially the same provisions as the code.

The pertinent portion of section 23, chapter 174, Laws of 1885, is as follows:

"Then the *board of commissioners of each county shall levy* annually a special tax to supply the deficiency for the support and maintenance of said schools for the said period of four months or more."

It is manifest that the authority purporting to be given by the act of 1869 (the Code, sections 1996 to 2000) is general, and as an enabling act that statute is insufficient for the reasons already stated.

SUMMARY OF DEFECTS OF ENABLING ACTS RELIED ON.

1st. The three legislative amendments to the charter are void under article 2, section 14, of the constitution.

2d. The original charter ought to be construed alone, because the acts of 1852, chapter 136, contain the charter of the "*Atlantic and North Carolina Railroad Company*," while the reference in the original charter is to the "act to incorporate the *North Carolina and Atlantic Company*." (See opinion in Commissioners *vs.* Call.) The fact that this radical mistake was not noticed in Hilo *vs.* Commissioners does not cure it.

3d. If the reference incorporates the sections, as claimed, still there is no statement of a "special object," but an attempt to confer authority to run branches to every county in the State and authorize every county "on or near" any line located to subscribe.

The majority of the court as well as the minority in Commissioners *vs.* Call, 123 N. C., *supra*, said the subscription was made and the bonds were issued before the adoption of the constitution, on April 24, 1868.

Justice Douglass, in the leading opinion, cites Norton *vs.* Brownsville, after the statement that such was the fact, and Justice Furches, in the dissenting opinion, at page 330, says:

"*But this* charter was framed, the *subscription was made and the bonds were issued before the adoption of the constitution of 1868*, which did not go into effect till the 22d of April of that year."

The appellants were justified in concluding, as the court may conclude, the court in North Carolina as now constituted, having the right to review the full original records in "the Hill and Bilo cases," had stated the facts correctly, whether or not that statement conflicted with what may have been an incorrect statement made in the opinion in the first and perpetuated in the second of said cases. *It would seem that no decision of this court has denied to the highest State tribunal the right to determine what were the facts upon which their decisions were predicated, or has conceded the authority of the Federal courts to conclude that both the majority and minority of the court made either an incorrect statement of the facts through inadvertence or a false one.* The counsel for appellants felt warranted in following the unanimous view of the facts upon which both opinions in the State tribunal were predicated.

If the court here can conclude that the facts are as contended by counsel for appellees, nevertheless under the rulings of the court when the bonds were issued *they were not valid.*

1st. Because neither the charter of March 9, 1868, nor the act of 1869 (the Code, sections 1996 to 2000) were sufficiently specific in designating the donees of the power claimed to have been conferred.

2d. Because a reference to the charter of the "*North Carolina and Atlantic railroad,*" in section 12 of the charter (page 27 of the printed record), did not by any known rule of construction incorporate sections of the charter of the "*Atlantic and North Carolina Railroad Company*" (a totally different corporation), as will appear by reference to "chapter

136 of the Laws of North Carolina, session of 1852" (referred to on page 31 of the printed record). This radical error is referred to by the court as an evidence of the insufficiency of the power.

3d. Because, though after making such a grave mistake as to the very essence and nature of the authority relied on, the court concluded that there was sufficient authority shown in the two charters, it nevertheless appears that the act of August 11, 1868 (there being no evidence offered as to its failure to pass in the regular way), was treated as a curative act, conferring special authority *in terms on Forsyth county only.* This the court could treat as a mistake in subsequent cases when the journal was offered in the Supreme Court (see Post *vs.* Supervisors, 105 U. S., 667, 668). Correct both of these errors, as the court had the right, and it was its duty to do, and the only power remaining would be that given in section 13 of the charter, etc.: "All counties and towns subscribing to said company in the manner and under the same rules, regulations, and restrictions, prescribed by the act incorporating the North Carolina and Atlantic Railroad Company to subscribe to the capital stock of said company." *What the "rules, regulations, and restrictions"* referred to may be will only appear when the proper charter is found. Whether there was or was not such a charter does not appear, but *the mistake, if mistake it was, in the reference may account for the abortive attempt to confer power by the act of February* 20, 1879 (Printed Record, page 29), and the act of March 2, 1881 (Record, pages 30 and 31). Though the court *ex mero motu* takes no notice of a private law (Hughes *vs.* Commissioners 107 N. C., 598) where the chapter of the laws pub-

lished by authority of the State was referred to in an opinion offered in evidence or in the bill of complaint, as here, the reference to chapter 136, Laws of 1852, which showed this error, it could be corrected by the court just as the error as to the curative act may be corrected, by calling attention to the evidence offered.

It is the established practice of the supreme court of North Carolina, when a dispute arises as to the facts upon which an older decision was based, to refer to the original record of that case.

4th. The act of 1869 (the Code, sections 1996 to 2000) is also too general in its character, and the court followed the prior decision in Galloway *vs.* Commissioners, 63 N. C., *supra*, in construing it. In that case the court construed and applied the language of article V, section 4, of the constitution of North Carolina, which is as follows:

"The General Assembly shall have no power to give or lend the credit of the State to any person, association, or corporation, *except* to aid in the completion of a railroad which may be unfinished at the time of the adoption of the constitution, or in which the State has an interest."

It was held in Galloway *vs.* Railroad, *supra*, that a branch of the Chatham railroad, the construction of which was authorized by the act of 1868, amending a charter granted in 1863, was not an unfinished road when the constitution was adopted, although the original charter authorized the building of a road from Raleigh to the gulf, in Chatham county, with branches, and the amendment of 1868 (see facts stated in Galloway *vs.* Railroad) provided for a branch running from some point on the original line. The work on the orig-

inal line was held not to constitute the branch road an unfinished road within the meaning of article V, section 4.

The act of 1869 was re-enacted *in totidem verbis* in the Code, sections 1996 to 2000 (Record, page 25).

Section 3766 of the Code of North Carolina is as follows:

"When a part of a statute is amended it is not to be construed as having been repealed and re-enacted in the amended form, but the portions which are not altered are to be considered as having been the law since their enactment and the new provisions as having been enacted at the time of the amendment."

This section has been construed in the following late decisions:

Wood *vs.* Bellamy, 120 N. C., 212.

State Prison *vs.* Day, 124 N. C., 362.

Wilson *vs.* Jordan, 124 N. C., 363.

It is needless to recite the older cases cited in the three decisions last named, since it was conceded by the learned counsel that the provisions of the Code, sections 1996 to 2000, are in contemplation of law the act of 1868–1869.

The act of 1868–1869 speaks therefore as of the date of its enactment, and hence the construction given to it in Commissioners of Stanley County *vs.* Snugger, 121 N. C. Rep., 394.

The act, being a part of the reconstruction legislation giving effect to the constitution of 1868, it is not strange that the words "*in the completion of any railroad in which the citizens of the county may have an interest*" were construed as speaking of roads unfinished at the time of the passage of the act or the adoption of the constitution. *It was deemed*

a part of the policy of the State to place its subdivisions under the same restrictions as the State by preventing them from aiding in the completion of a road not then begun.

The branch from Winston-Salem to Wilkesboro was an unfinished road in the same sense that the Cheraw branch of the Chatham road—the creature of the same legislature of 1868—was. "It had not been begun" when the act of 1868–1869 was passed.

The citizens of the county could have had no peculiar interest unless it was a pecuniary interest.

Every tax-payer of the State is interested, in a sense, in the improvement and advancement of values in every part of the State. But it is evident that the legislature intended to refer to some peculiar interest at the time of the passage of the act. Besides, the words *ex vi termini* meant pecuniary interest in the connection in which they were used. (See authorities cited at page 36 of appellants' former brief.)

In examining the question of the power to issue bonds, courts generally lean neither to the tax-payer nor to the bondholder. But the Federal courts when the question of the correctness of the ruling of a State court "is balanced with doubt" will follow it.

Burgess *vs.* Seligman, 107 U. S., 20.

Forsyth *vs.* Hammond, 166 U. S., 518, 619, 620.

THERE WAS NECESSITY FOR NEW LEGISLATION, AND THE NEW LEGISLATION WAS VOID UNLESS ENACTED UNDER ARTICLE 2, SECTION 14.

If there was no authority except the very words of section 13 of the charter, new legislation was needed and required by section 7, article 7, of the constitution. When once the necessity for new legislation was admitted in order to invest the county with authority, it followed that such legislation must be passed in pursuance of the requirements of the new State constitution. *This case is to be distinguished from Norton vs. Brownsville, supra, in that the constitution of Tennessee contained no requirement as to the manner of enacting such laws.*

THE MISSOURI CASES.

The Missouri cases referred to by counsel for appellees were decisions following the settled rulings of the highest court of that State, not a construction by the Federal court of its laws, and we invoke the same principle to sustain our contention in the case at bar.

See County of Calloway *vs.* Foster, 93 U. S., 567, 570.
County of Thomas *vs.* Nicolay, 95 U. S., 619, 625.

THE STATEMENT OF COUNSEL THAT THE TAX-PAYERS DO NOT OBJECT TO PAYING THESE BONDS NOT CORRECT.

Counsel for appellants do not propose to meet these statements by simple denials; but they refer to the public laws of North Carolina, under which the personnel of a town government changes by popular election every year, and that

of the counties every two years, and yet this litigation, as appears from the decisions referred to, has been kept up during three terms of the officials of the three counties litigating and many successive terms of the officers of the town of Oxford. If the litigation had not met public approval, the new officials would have put an end to it.

The gratuitous statement that there was collusion it is not necessary to answer (Adams Ex. Co. *vs.* Ohio State Auditor, 165 U. S., 194); but this charge has been met and refuted in every court into which those controversies have been carried. In this particular case it appeared that Messrs. Battle & Mordecai, counsel for the defendant in Commissioners *vs.* Payne at the very same term, argued ably for the defendants all of the points involved in Commissioners *vs.* Call, and hence no brief was filed for Turner and Welborn.

The Mistake in the Copy of the Opinion Sent Up in Case of Turner vs. Commissioners of Wilkes.

A reference to the Southeastern Reporter of proper date will show that the opinion of Justice Douglass had been published in that law journal before the case of Turner *vs.* Commissioners of Wilkes was heard here. It may well be assumed that counsel for the plaintiff in error assumed, as did opposing counsel, that the clerk would send up a correct copy, and therefore failed to read that part of the record. An affidavit of the clerk of the supreme court of North Carolina, on file in this case at Richmond, shows the mistake was his. It does appear from the act of 1879, chapter 43 (Record, page 29), that the charter required that the line should pass Wilkesboro, south of the Yadkin. It appears

from the agreement and admission here of counsel that the road was built only to North Wilkesboro, a mile north of that river, and that in 1893 J. M. Turner, E. Wallace, and others brought an action to compel the company by mandamus to carry out that contract, but submitted to nonsuit, at fall term, 1893, because the officers of the county had already issued and delivered the bonds (see agreement of counsel near bottom of page 33 of printed record), so that the tax-payers were not quietly submitting between 1889 and 1897, when a new county government presumably responded to the popular protest.

The supreme court of North Carolina decided in 1887 that a general act was invalid as authority for levying a tax, and that the defect destroyed the efficacy of an enabling act. This decision cited older ones, which it followed. A strict construction of the command contained in article V, section 7, made both the charter, in any view of its provisions, and the act of 1869, re-enacted in the code, void for failure to follow its requirements. The three amendatory acts were all void on account of the manner of their enactment.

NOTICE TO PURCHASERS OF BONDS OF DEFECTIVE POWER.

Every purchaser of a bond had constructive notice of the defect of power under the rulings in Broadnax *vs.* Groom, Barksdale *vs.* Commissioners, *supra*, and State *vs.* Patterson, *supra*, previously made, and no recitals could cure such inherent defect of power.

THE STRANGE RESULT THAT WOULD FOLLOW FROM A CONFLICT OF OPINION IN TWO JURISDICTIONS IN THIS CASE.

Turner and another, the holders of a single one of the bonds in controversy, have already brought up the case of Commissioners *vs.* Call, by writ of error to this court, and it has been held that they are concluded by the judgment in that case. So another well-known holder of eight thousand dollars in these bonds, who is a resident of the State of North Carolina, could not recover, and would be driven to the necessity of selling, at a sacrifice perhaps, to some non-resident. On the other hand, any non-resident holder of a sufficient amount in the bonds to confer jurisdiction on the Federal court would be entitled to enforce payment. It would seem desirable to resolve many doubts in favor of the State decision before bringing about such an unfortunate want of harmony.

A. C. AVERY,
Counsel for Appellants.

No. 1494
19497
FEB 5 190
JAMES H. McKENNEY
Clerk

UNITED STATES OF AMERICA,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND OTHERS, *Appellants*,

versus

W. N. COLAR & COMPANY, *Appellees*.

To the Honorable the Supreme Court of the United States:

The petition of the Board of Commissioners of the Town of Oxford, N. C., respectfully showeth:

1st. That at May Term, 1899, of the Circuit Court of Appeals of the United States for the Fourth Circuit, a judgment was rendered in the case of The Board of Commissioners of the Town of Oxford, N. C., plaintiffs in error, against The Union Bank of Richmond, Va., defendant in error, whereby the judgment of the lower Court was reversed; subsequently a petition to rehear said cause was presented to the said Court, and an order was made certifying to this Court for its opinion the above entitled case of The Board of Commissioners of Wilkes County against W. N. Colar & Company, and directing that further proceedings be stayed in the case of The Board of Commissioners of Oxford against The Union Bank of Richmond till the decision of this Honorable Court.

2d. That the question arising under the Constitution of North Carolina in both of said cases is the same, and as the decision of said question by this Honorable Court will probably end the controversy between the parties, your petitioners respectfully pray to be heard through their counsel.

Wherefore they respectfully pray the Court that they may be heard on the argument of this case and that the time may be enlarged to that end.

Your petitioners will forever pray.

R. O. BURTON,
Attorney for Petitioners.

I do not mean to say the town has no other defence. It has o
defences, which will be insisted on.

Feb. 1,1900. R.O.Burton, Att

UNITED STATES OF AMERICA,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND OTHERS, *Appellants*,

versus

W. N. COLAR & COMPANY, *Appellees*.

To A. C. Avery, Esq., Attorney for the Appellants, and Charles Price, Esq., Attorney for the Appellees:

You are hereby notified that on Monday, February 5, 1900, or as soon thereafter as counsel can be heard, a motion based upon the foregoing petition will be made in the Supreme Court of the United States in the above-entitled action, to allow the attorney of the Board of Commissioners of the Town of Oxford to be heard, and also to extend the time therefor.

R. O. BURTON,
Attorney for the Board of Commissioners of Oxford.

JANUARY *16, 1900.*

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No. 167

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JAMES H. McKENNEY,
Clerk.

By of Dillon, Hubbard & Dillon
for Appellees (on mo.)

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 471.

Filed Feb. 3, 1900.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.,
Appellants,
vs.
W. N. COLER & COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Memorandum on Behalf of Appellees on Motion to Advance the Case for Hearing.

Referring to the notice of motion for the advancement of this case, which motion is made by the appellants and noticed for Monday, February 5, we, as counsel for W. N. Coler & Company, the appellees, have to state that we have no objection to the advancement of this case for an early hearing. On the contrary, we join with the counsel for appellants in asking the court to advance the case.

The reasons for this request are briefly as follows, to wit:

1. This case involves, among other things, the construction of provisions in the constitution of the State of North Carolina, which provisions have been construed by the Supreme Court of that State as rendering constitutionally invalid a great number of statutes of the State under which many counties have issued negotiable bonds. Some of these decisions are mentioned in the Record, page 42. All these decisions of the Supreme Court of the State have been rendered since the bonds were issued; and, therefore, under the decisions of the Supreme Court of the United States, are not binding on the United States Courts. Not only so, but the holders of these bonds claim that, under prior decisions of the Supreme Court of the State, the statutes referred to were clearly constitutionally valid. The United States Circuit Court has refused to follow these later State Court decisions, and has held the bonds valid. There is here a conflict between the decisions of the State Courts and those of the United States Courts, which ought to be settled as early as possible.

2. Numerous cases have been brought in the State courts in which the boards of commissioners of counties of North Carolina have sought for and obtained injunctions against the treasurers of these counties forbidding the payment of interest on such bonds, in which cases the bondholders have not been parties. Bondholders have brought actions on their bonds in the United States courts, several of which actions are pending and undetermined, and the United States Cir-

cuit Court of Appeals for the Fourth Circuit has certified certain questions in this present case to this court, among others the question whether the United States courts are bound to follow these decisions of the North Carolina Supreme Court rendered after the bonds were issued. These cases in the United States courts are being held until these questions certified in this case shall have been decided by this court. Thus, for example, the United States Circuit Court of Appeals for the Fourth Circuit is now holding under advisement a petition for rehearing in the case of certain Stanly county, North Carolina, bonds until the questions certified in this case are answered by this court. So, also, the Circuit Court of the United States for the Western District of North Carolina has declined to try a case involving the validity of Buncombe county, North Carolina, refunding bonds until after the decision of this court in the present case. Thus, the trial and decision of these numerous municipal bond cases in the United States courts in North Carolina are being held to await the decision of this court in this case.

3. In the case of many of these bond issues, the county officers have for some time past either stopped the collection of taxes to pay interest thereon, or, in cases where such taxes have been collected, the moneys are held idly in the hands of the officers of the county, or in the hands of receivers appointed by the court, which is contrary both to the public welfare of the counties, and also to the interests of the numerous holders of bonds of these several counties. If these counties in North Carolina which have thus attempted

to repudiate their bonds have failed, or shall fail for a long time, to collect the necessary taxes to pay the interest, and the bonds are valid (as we believe they will finally be adjudged to be), then there will be a great amount of arrears of taxes for these counties to pay, which may be a heavy burden upon the taxpayers, imposed upon them without their fault by the action of their officers, and the counties may become financially embarrassed, and the United States Circuit Courts in North Carolina may have the unpleasant duty of enforcing mandamus proceedings to compel the taxpayers to pay such arrears. Thus, there is danger that the experience of the United States Circuit Courts in Missouri, in similar cases, may be repeated in North Carolina—a public calamity which ought to be prevented, if possible.

4. One phase of this litigation has already been before this court. There was an attempt made to bring one of these decisions of the Supreme Court of North Carolina (in a case wherein the board of county commissioners of this very county sought an injunction against the treasurer of the county forbidding the payment of interest on the county bonds) before this court on writ of error to the State Supreme Court. The bonds there in question were the very same issue of bonds that are involved in the present case. The writ of error in that case was, of course, dismissed for want of jurisdiction (*Turner vs. Wilkes County Commissioners*, 173 U. S., 461). J. M. Turner and J. M. Wellborn, claiming to own one bond, were on their own motion made parties in that case. The plaintiffs, bondholders in the present case, were not parties and had nothing to do with that case.

We therefore respectfully urge upon the court that the public good of these counties in North Carolina and their taxpayers, as well as the interests of the numerous holders of these bonds (which in any view have been issued under color of law, and which year after year have been recognized by the counties and their officers by payment of interest thereon, and in some instances by the issue of refunding bonds), require that an early hearing be had upon the matter in controversy in this case, to the end that if these bonds are held valid (as we submit they ought to be), the counties may proceed with the due collection of the taxes necessary to pay the interest thereon before burdensome arrears of taxes accumulate; and in order that the holders of the bonds be not subjected to the delays in the United States courts which at present exist in the trial and disposition of their cases as above stated.

Respectfully submitted,

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
Of Counsel for Appellees.

Supreme Court of the United States.

NO. 167.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.,

vs.

W. N. COLER & COMPANY.

ARGUMENT FOR W. N. COLER & COMPANY, COMPLAINANTS.

Statement of the Case.

This was a suit commenced in the Circuit Court of the United States for the Western District of North Carolina, at Greensboro, within said district, on the 22d day of February, 1899, by W. N. Coler & Company, against The Board of Commissioners of Wilkes County, North Carolina, and others.

On the 14th day of April, 1899, there was entered a decree in favor of the complainants, which decree is set out in full on page 41 of the printed record of the certificate from the Circuit Court of Appeals for the Fourth Circuit.

After the entering of the said decree this suit was taken by appeal to the Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, and on the 17th day of November, 1899, the said Circuit Court of Appeals, desiring for its proper decision the instruction of the Supreme Court of the United States concerning certain questions or propositions of law arising in said suit, certified said questions or propositions of law so arising as follows (Printed record of certificate, pp. 42 and 43):

"FIRST. Whether, upon the averments of the bill of complaint, answers, replications, orders, exhibits and other evidence, and matters and things recited herein, the circuit court of the United States was bound, in passing upon this case, by the decisions of the supreme court of North Carolina in the following cases:

Commissioners of Wilkes County vs. Clarence Call et al., 123 North Carolina Report, 308;

Bank vs. Commissioners, 119 N. C. Rep., 214;

Commisioners vs. Snuggs, 121 N. C. Rep., 394;

Rodman vs. Washington, 122 N. C. Rep., 39;

Commissioners vs. Payne, 123 N. C. Rep., 432;

considered in connection with prior decisions of said court and the following provisions of the constitution of said State:

"Article 2, sections 14 and 16, and article 5, sections 1, 4, 6 and 7, and article 7, section 7.

"SECOND. Whether, if the bonds and coupons in question were issued, put in circulation, and came to the hands of complainants, appellees, in due course of trade, for valuable consideration and without notice, and if there were at that time no decision of the supreme court of North Carolina adverse to these bonds or identical bonds issued under similar statutes, the bonds held by complainants are valid bonds.

"THIRD. Whether there was any decision adverse to the validity of these bonds or identical bonds or any construction of the constitution or law of North Caro-

lina which affected the question of their validity when they came in due course of trade and for valuable consideration and without notice other than such notice as the parties are assumed to have of existing provisions in the constitution and statutes of the State of their invalidity."

The Circuit Court of the United States was not bound in passing upon this case by the decisions of the Supreme Court of North Carolina in the cases named in the first certified question or proposition.

The decisions above referred to were made long after the issue of the bonds and years after they had come into the hands of complainants, as set out in the bill. This fact is not denied; indeed, it is conceded.

Before proceeding further, we call the attention of the court to the fact that this case has been passed upon, at least, to some extent, by the Supreme Court of the United States. The title of the case is *Turner vs. Wilkes County Commissioners*, Volume 173 U. S. Reports, page 461.

The opinion of the court points out plainly in what cases the decisions of the State courts will be followed by the Federal courts, and is written in support of the judgment, dismissing the writ of error, for the reason that there was a want of jurisdiction of the Supreme Court, no Federal question being presented for its adjudication.

On page 463 of the volume cited Justice PECKHAM says:

"But in this case we have no power to examine the correctness of the decision of the Supreme Court of North Carolina, because, this being a writ of error to a State Court, we cannot take jurisdiction under the

allegation that a contract has been impaired by a decision of that court, when it appears that the State Court has done nothing more than construe its own Constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation touching the subject. We are, therefore, bound by the decision of the State Court, in regard to the meaning of the Constitution and laws of its own State, and its decision upon such a state of facts raises no Federal question. *Other principles obtain when the writ of error is to a Federal Court.*"

In the same opinion, in the paragraph next to the last, is the following:

"An example of the jurisdiction exercised by this court, when reviewing a decision of a Federal Court, with regard to the same contract clause, is found in the same volume (*Folsom vs. Ninety-six*, 159 U. S. Reports, 611, 625)."

In the light of this reference to the Folsom case, we think it is natural to conclude that the facts in the case at bar suggested to that court the similarity between the two cases.

We anticipated the decision of the Court in the case of *Turner vs. Wilkes County Commissioners*, as will be seen by reference to the bill in the present case. (Paragraphs 17 and 18, on page 5 of printed certificate of record).

In the argument of the *Stanly bond case* in the Circuit Court of Appeals, very similar to this case, and to which we will call the attention of the Court in a subsequent part of this brief, we relied on the *Folsom case*, referred to by Justice PECKHAM, as decisive of it, in favor of these complainants; and we maintain here that the principles laid down in that case by Justice GRAY are the principles which should govern in the case now under discussion.

In the *Folsom case* Justice GRAY, who wrote the opinion in the case of *Post vs. Supervisors*, 105 U. S. R., 667 (the latter being cited and quoted from, in the opinion of the Circuit Court of Appeals, in support of its decision in the *Stanly case*), says:

"The first question, certified to this Court, by the Circuit Court of Appeals, is, whether upon the averments of the complaint the Circuit Court was bound in passing upon this case by the decision of the Supreme Court of South Carolina in *Floyd vs. Perrin*, 30 So. Car.."

In answer to this question this Court held *it was not bound by that case*, and the bonds were adjudicated to be valid. It is to be remarked that the Supreme Court of South Carolina had adjudged the bonds sued on in the *Folsom case* to be null and void.

If the case had been taken from the Supreme Court of South Carolina to the Supreme Court of the United States by writ of error, the latter court would have dismissed the writ, as was done in the case of *Turner vs. Wilkes Co. Commissioners*, before cited; and for the reason given in that decision, and in the case of *Central Land Co. vs. Laidley*, 159 U. S. R., page 103. It is to be noted that the same member of the Court, Justice GRAY, wrote the opinion in the *Laidley case* that wrote the opinion in the *Folsom case*, and in the case of *Post vs. Supervisors*, as before remarked.

In the *Turner and Wilkes case*, and the *Laidley case*, there had been no *legislation* by the State, impairing the obligation of a contract, which legislation was upheld by the Supreme Court of the State. Therefore, these cases being taken to the Supreme Court of the United States from the State Supreme Court under the contract clause of the Constitution, which provides

that no State shall pass any law impairing the obligation of contracts, were dismissed.

In the *Folsom Case*, the writ of error being to a *Federal Court*, and the case, as in the case at bar, being taken from the *Circuit Court* of the United States to the Supreme Court, *this* case being taken to the Circuit Court of Appeals, "other principles obtain," as said by Justice PECKHAM in the *Wilkes case*.

What are these "other principles?" Those, we submit, laid down by Justice GRAY in the *Laidley case* and in the *Folsom case*.

In the *Laidley case* there was a writ of error to the Supreme Court of the State of West Virginia, and the plaintiff in error insisted that the Supreme Court had jurisdiction to reverse the decision of that court. The Supreme Court, however, dismissed the writ of error; and Justice GRAY, in the opinion, on page 111, volume 159 U. S. R., says:

"The decisions cited by the plaintiff in error to support the jurisdiction of this court, in the case at bar, were either cases in which the writ of error was upon a judgment of a State court which gave effect to a *statute*, alleged to impair the obligation of a contract made before any such statute existed, as in *Louisiana vs. Pilsbury*, 105 U. S., 278; in *Chicago Ins. Co. vs. Needles*, 113 U. S., 574, and in *Mobile & Ohio Railroad vs. Tennessee*, 153 U. S., 486; or else the writ of error was to a Circuit Court of the United States, bringing to this court the *whole case, including the question* how far the courts of the United States should follow the decisions of the highest court of the State, as in *Gelpcke vs. Dubuque*, 1 Wallace, 157, 205; *Olcott vs. Supervisors*, 16 Wall., 678, 690; *Douglass vs. Pike County*, 101 U. S., 677, 686; *Anderson vs. Santa Anna*, 116 U. S., 356, 361, and other cases cited in *Louisiana vs. Pilsbury*, 105 U. S., 278, 295."

The case at bar is an appeal to the *Circuit Court of Appeals* from a decree of a *Circuit Court* of the United

States, " *bringing to this court the whole case, including the question how far the courts of the United States should follow the decisions of the highest court of the State.*"

Then we come to the question as to "how far the courts of the United States should follow the decisions of the highest court of the State."

The leading case upon this subject, and the one always relied on for a statement of the true rule, is *Burgess vs. Seligman*, 107 U. S. R., pages 20 and 33.

Justice GRAY in the *Folsom case* cites it, and quotes from it at length as the leading case, and lays down, himself, in that case, the rule as Justice BRADLEY defined it in the *Burgess* and *Seligman case*. Indeed, he bases his decision in the *Folsom case* upon this rule.

Speaking of this question Justice GRAY, on page 624, 159 U. S. R., says:

" The general principles which must govern the decision of this question have been often affirmed by this court, and were stated by Mr. Justice BRADLEY in delivering judgment, after great consideration, in the leading case of *Burgess vs. Seligman*, as follows:

"' The Federal Courts have an independant jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws.' "

These are the words of Justice BRADLEY, in the case above cited.

With regard to the law of real estate, and the construction of State Constitutions and statutes, the Federal Courts will follow the constructions and decisions of the State Courts, except when contracts and transactions have been entered into, and rights have accrued thereon, *under a particular state of the decisions*, or

when there has been no decision of the State tribunals.

In this same case, on page 33, 107 U. S. Reports, Justice BRADLEY says: "We do not consider ourselves bound to follow the decision of the State Court in this case."

This was a case reviewed by the Supreme Court of the United States, upon a writ of error to a *Federal Circuit Court*, the latter having *refused to follow the decision of the State Court*, and the judgment of the Circuit Court was affirmed.

As the Circuit Court of Appeals, one year ago, in the *Stanly case*, seemed to take a different view of this rule from the one we cite from Justice BRADLEY, and as the petition for a rehearing in that case is now pending in that Court, and is to await the decision of this Court in the case at bar, we have argued this branch of the case more at length than we would otherwise have done.

We submit, further, that the rule to which there is *no exception*, and which has never been departed from, is defined as follows:

"The sound and true rule is, that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State or *decision* of its courts, altering the construction of the law" *(Ohio Life Insurance and Trust Company vs. Debolt*, 16 Howard, 432*)*.

In the last number of the U. S. Reports, Volume 174, page 499, *Wade vs. Travis County*, we find the rule laid down by Justice BROWN, in a case involving "the validity of certain bonds, issued

by the county of Travis," in the State of Texas. That Justice says, in the outset, that the case involves " the weight to be given to alleged conflicting decisions of the Supreme Court of Texas as to the validity of such bonds."

The case was begun in the Circuit Court of the United States, and the judgment of that court was affirmed by the Circuit Court of Appeals. Upon plaintiff's petition for *certiorari* the writ was allowed, and the Supreme Court reversed the decisions of these courts, which were against the validity of these bonds, as being issued in violation of the Constitution of Texas, and adjudged that they were valid and legal bonds. On page 508 the Justice says :

" In determining what the laws of the several States are, which will be regarded as rules of decision, we are bound to look not only at their Constitutions and statutes, but at the decisions of their highest courts giving construction to them." *Post vs. Supervisors*, 105 U. S., 667, is one of the cases cited, in support of this rule, by the court.

" If there be any inconsistency in the opinions of these courts, the general rule is," adds the Justice, " that we follow the latest settled adjudications in preference to the earlier ones."

After laying down the general rule, as above, Justice BROWN says :

" An exception has been admitted to this rule, where, upon the faith of State decisions affirming the validity of contracts made or bonds issued under a certain statute, other contracts have been made or bonds issued under the same statute before the prior cases were overruled. Such contracts and bonds have been held to be valid upon the principle that the holders, upon purchasing such bonds, and the parties to such contracts were entitled to rely upon the prior decisions as settling the law of the State. To have held otherwise, would enable the State to set a trap for its creditors, by inducing them to subscribe to bonds, and

then withdrawing their own security *(Gelpcke vs. Dubuque*, 1 Wall., 175*)*." Other cases are cited for this exception, including *Burgess vs. Seligman*, 107 U. S., 20.

See further cases in this Court referred to in this Brief, infra, p. 59, under the subhead " Relevant and Controlling decisions in the United States Supreme Court in favor of Complainants' Contentions."

It is to be specially observed here that Justice BROWN cites, in support of the rule stated, the well-known case of *Gelpcke vs. Dubuque*, 1 Wall. That the Court may apply the foregoing to the facts in the case at bar, it is necessary to know when the decisions named in the first question or proposition were rendered; and when the bonds in question were issued, and when purchased by the complainants.

The cases are as follows :

Commissioners of Wilkes County vs. Clarence Call et al., 123 N. C. R., 308, decided November, 1898.

Bank vs. Commissioners, 119 N. C. R., 214, decided October, 1896.

Commissioners vs. Snuggs, 121 N. C. R., 394; decided November, 1897.

Rodman vs. Washington, 122 N. C. R., 39; decided, May, 1898.

Commissioners vs. Payne, 123, N. C. R., 432; decided, December, 1898.

The bonds in question were issued in October, 1889, and were purchased immediately after and during the same month by complainants in open market in the City of New York, for value, in good faith, they being unaware of any alleged defect of authority or other

irregularity in their issue and sale and having no suspicion of any such defect or irregularity.

Upon these bonds, as alleged in complainants' bill, the interest was paid semi-annually for eight years by the corporate authorities of Wilkes County. These bonds of Wilkes County are negotiable paper, and were issued not only at a time when no adverse decision of the State Courts had been made, but (as shown, *infra*) at a time when under decisions of the State Supreme Court as they then stood, and under the general principles of jurisprudence the said bonds were clearly valid.

We therefore maintain that the Circuit Court of the United States *was not bound*, in passing upon this case, by the decisions above set out, considered in connection with prior decisions and the articles and sections of the Constitution named in the first question or proposition certified by the Circuit Court of Appeals for instructions.

The Second and Third Questions Certified.

We come now to the second question or proposition certified (Record, p. 43):

"Whether, if the bonds and coupons in question were issued, put in circulation and came to the hands of complainants appellees in due course of trade for valuable consideration and without notice, and if there were at that time no decision of the Supreme Court of North Carolina adverse to these bonds or identical bonds issued under similar statutes, the bonds held by complainants are valid bonds."

The third question or proposition, it seems to us, is

so related to the second and dependent upon it that we will discuss both under the second head of this argument. It is as follows (Record, p. 43):

"Whether there was any decision adverse to the validity of these bonds or identical bonds, or any construction of the Constitution or law of North Carolina which affected the question of their validity when they came in due course of trade, and for valuable consideration, and without notice other than such notice as the parties are assumed to have of existing provisions in the Constitution and statutes of the State of their invalidity."

Responsive to these questions, we hope to show these bonds in question are valid and legal bonds and that the ordinance and statutes authorizing their issue and sale, were enacted in accordance with the Constitution, *as interpreted and construed* by the highest Court of the State for many years before and even after their issue.

Doctrine of the Federal Courts as to State Court Decisions.

Here, again, we advert to the rule in *Burgess vs. Seligman*:

On page 625, Vol. 159, U. S. R., Justice BRADLEY lays down the rule as follows:

"Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established, which become rules of property and action in the State, and have all the effect of law and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes.

"But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment, as they always do in reference to the doctrines of commercial law and general jurisprudence."

What this Court says in *Township of Pine Grove vs. Talcott*, 19 Wall., 666, 667, is especially in point in the present case, and, therefore, we quote:

"The question before us [the validity of certain railroad aid bonds] belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself. Here commercial securities are involved. When the bonds were issued there had been no authoritative intimation from any quarter that such statutes were invalid. [This is emphatically true in respect of the Wilkes County bonds.] * * * The National Constitution forbids the States to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective States we should abdicate the performance of one of the most important duties with which this tribunal is charged and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery *(Butz vs. Muscatine*, 8 Wall., 579*)*."

In *Gelpcke vs. Dubuque* 1 Wall., 175, this Court says (p. 296):

"The same principle applies where there is a change of *judicial decision as to the constitutional power of the Legislature to enact the law.* [This is especially applicable here as the State Supreme Court in the *Forsyth County cases* of *Hill* and *Belo* decided in 1870 and 1877 had affirmed the validity of the laws authorizing the issue of the Wilkes County bonds.] To this rule thus enlarged we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. Bonds and coupons like these, by universal commercial usage and consent, have all the qualities of commercial paper. * * * We are not unmindful of the importance of uniformity

in the decisions of this court, and those of the highest local courts, giving constructions to the laws and Constitutions of their States. It is the settled rule of this court in such cases to follow the decisions of the State Courts. But there have been heretofore in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases."

Settled course of decision in North Carolina at the date of the issue of the bonds in suit, 1889, in favor of their validity.

In the next place, we are to inquire as to whether there was "*a settled course of decision*" in North Carolina upon the question presented by the record in this suit. If there was one at the time of the issue of the bonds and purchase of the same by complainants, this court will follow it.

In *Louisville, &c., Ry. Co. vs. Louisville Trust Company*, 174 U. S. R., on pages 573 and 574, Justice GRAY says :

"In *Merchants' Bank vs. State Bank*, 10 Wall., 604, this court stated as an axiomatic principle in the law of corporations this proposition : 'Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them' (10 Wall., 644, 645). The proposition was supported by citations of many English and American cases, and among them *Royal British Bank vs. Turquand* (1856), 6 El. & Bl., 327. And the justices of this court, while differing among themselves in the application of the principle to municipal bonds, have always treated *Royal British Bank vs. Turquand* as well decided

upon its facts. *Knox County vs. Aspinwall*, 21 Howard, 539, 545 ; *Moran vs. Miami County*, 2 Black, 722, 724 ; *Gelpcke vs. Dubuque*, 1 Wall., 175, 203 ; *St. Joseph vs. Rogers*, 16 Wall., 644, 666 ; *Humboldt vs. Long*, 92 U. S., 642, 650. And see *Zabriskie vs. Cleveland, Columbus and Cincinnati Railroad*, 23 Howard, 381, above cited."

The cases cited by Justice GRAY in the above paragraph are decided upon *municipal bonds*, and show that the principle he states applies to contracts with municipal, as well as to other corporations ; and the late Justice MILLER, in his dissenting opinion, in the case of *Humboldt Township vs. Long*, 92 U. S. R., pages 650 and 651, says the case of *Knox County vs. Aspinwall*, 21 Howard, 539, the original case, on which the rule and principles are based, is itself based upon *The Royal British Bank vs. Turquand.*

We state the above principle at this point in the argument to give emphasis to the rule that this court will so construe the Constitution of North Carolina, and the statutes authorizing the issue of the bonds, as to uphold the validity of the same, purchased in good faith, as they were, *if it can do so*, " *under any circumstances.*"

If this court can find there existed in North Carolina, at the time of the issue and sale of the bonds a course of decision of the highest court, upholding their validity, it will adopt that course of decision, and follow the same.

In the *Folsom case*, Justice GRAY, attaches importance to the inquiry, as to whether there is " a settled course of decision " in the State, upon the question stated (Vol. 159, U. S., page 627). The Court *will look* for a settled course of decision sustaining these bonds, in the interest of the innocent holder of the bonds,

who has purchased the same in good faith and for value.

Now, what constitutes a settled course of decision is a *question of law*, and to be decided by the court. If the court find decisions in the State which *appear* to have assumed the validity of such bonds as these, which decisions were rendered before their issue and sale, as alleged in the bill; and if the court find in the State decisions which *appear* to hold that the statutes authorizing the issue of these bonds were enacted in accordance with the Constitution; and if the court find that these bonds, and like bonds of other counties, were regarded and treated as valid securities by the *corporate authorities* of the county and by the *public*, by the *legal profession* and by the *legislative, executive* and *judicial departments* of the State; and if the court find that the complainants purchased the bonds, as alleged in the bill, relying upon their being legal and valid obligations of the county of Wilkes, then, as a matter of law, the court will hold there *was* a settled course of decision in the State, and that course of decision should be followed in passing upon the validity of the bonds.

Whether there was such a settled course of decision in the State before the issue and sale of the bonds; whether there were decisions of the highest court of the State, before the issue of the bonds and before the sale of the same, which *appear* to have assumed the validity of such bonds as these, and whether the decisions before and at the time of the issue and sale of the bonds *appear* to sustain and uphold the statutes authorizing the issue as having been legally enacted and according to the Constitution, and whether, acting upon these decisions, the corporate authorities of the

county regarded them as valid bonds, and whether they were so regarded by the executive, legislative and judicial departments of the State, and whether they were so regarded by the public and by the legal profession, are *questions of fact* to be determined upon evidence.

These are the rules by which the validity of the bonds sued on are to be determined.

Justice GRAY, in the *Folsom case*, on pages 626, 159 U. S. R., defines them to be as here stated. He does it in almost the exact words we have used.

The matters of fact must be determined in the first instance and *by evidence*. The decisions relied on by the County of Wilkes, all cited in the brief of the solicitor for the complainants—*Union Bank of Richmond vs. Commissioners of Town of Oxford*, 119 N. C., 214, S. E., 966; *Board of Commissioners of Stanly County et al. vs. Snuggs, County Treasurer*, 121 N. C., 394, 28 S. E., 539; *City of Charlotte vs. Shepard*, 120 N. C., 411; 27 S. E., 109; *Rodman vs. Town of Washington*, 122 N. C., 39; 30 S. E., 118; *Board of Commissioners of Wilkes County vs. Call et al.*, 123 N. C., 308—*are not even competent evidence* upon these matters of fact, because, as Chief Justice TANEY says:

"The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then *expounded by all the departments of its government* and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent acts of the legislature of the State or decision of its courts altering the construction of the law" *(Ohio Life Insurance and Trust Company vs. Debolt*, 16 Howard, 432*)*.

And because, as Chief Justice WAITE says:

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its

operation on contracts and existing contract rights that would be given to a legislative enactment—that is to say, make it *prospective*, but not *retroactive*. After a statute has been settled by judicial construction the *construction* becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment" *(Douglass vs. Pike County*, 101 U. S., 687*)*.

The Court will see that the decisions named in the first question or proposition, certified by the Circuit Court of Appeals, were rendered years *after* the issue and sale of the bonds and purchase of the same by complainants.

What we propose to show as evidence of the fact that there was a settled course of decision in this State before and at the time of the issue and sale of the bonds, are decisions of the highest court of the State, from the adoption of the Constitution in 1868 to the year 1896, when the case of the Union Bank of Richmond vs. Commissioners of Oxford was decided (119 N. C. R., 214).

These decisions are evidence and show *what appeared* to be the law of the State before and at the time of the issue and sale of the bonds in 1889, seven (7) years *before the first decision*, relied on by appellants, was rendered in 1896.

On pages 24, 25, 26 and 27 of the certified record is printed the Charter of The North Western North Carolina Railroad Company, passed and granted by the Convention of 1868, being Chapter 17 of the Ordinances of that Convention, and *before the ratification of the* Constitution of 1868.

The sections of the Code of North Carolina, sections 1996 and 1997, authorizing the issue of the bonds and referred to in the bill, paragraph 21, page 5 of the record, are printed on page 28 of the same.

The statutes passed by the Legislature of North Carolina and referred to in the bill, paragraph 21, pages 5 and 6 of the record, are printed on pages 27, 28, 29, 30, 31 and 32 of the certified record.

The County of Wilkes contends that these statutes, not including, however, the ordinance charter, nor the sections of the Code referred to, are null and void, being unconstitutional, because enacted in violation of Article 2, section 14 of the Constitution.

It is admitted that the original charter—the ordinance—is valid, and that the sections of the Code, 1996 and 1997, were enacted in accordance with the requirements of Article 2, Section 14 of the Constitution, which is as follows:

"No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house, respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal."

The County insists that these *statutes* were enacted without the entries upon the journals of the yeas and nays, on the second and third readings, or one of such readings, of the bills.

The contention of the complainants is, that the bonds issued, under these statutes, are valid by the

laws of the State, and under the Constitution,, " *as expounded by all the departments of the government,*" and administered by the courts of justice, the same being in the hands of innocent purchasers for value, and issued and sold in good faith, and purchased by complainants, also, in like good faith.

Now, we come to the evidence of the facts, which constitute that settled course of decision in North Carolina, upon the question of the constitutional enactment of the statutes, relied on by complainants as authority and power, for the issue of these bonds.

Under the North Carolina decisions as they stood in 1889, when the bonds in suit were issued, an enrolled, duly signed and published act could not be impeached by legislative Journals.

In *Brodnax vs. Groom*, 64 N. C., 244, decided in 1870, the constitutionality of an act of the Legislature was attacked because section 12, Art. 2 of the Constitution was not complied with. This section is as follows:

" The General Assembly *shall not pass any private law, unless it shall be made to appear that thirty days notice* of application to pass such a law shall have been given, under such direction, and in such manner as shall be provided by law."

Upon this point the Court, speaking through Chief Justice PEARSON, says:

" We do not think it necessary to enter into the question whether this is a public local act, or a mere private act, in regard to which thirty days' notice of application must be given; for taking it to be a mere private act, we are of opinion that the ratification certified by the Lieutenant Governor and the Speaker

of the House of Representatives make it a matter of record, which cannot be impeached before the courts in a collateral way. Lord COKE says: 'A record, until reversed, importeth verity.' There can be no doubt that the acts of the Legislature, like judgments of courts, are matters of record, and the idea that the verity of the record can be averred against, in a collateral proceeding, is opposed to all the authorities. The courts must act on the maxim, '*Omnia praesumuntur, etc.*' Suppose an act of Congress is returned by the President, with his objections, and the Vice-President and the Speaker of the House certify that it passed afterwards by the constitutional majority; is it open for the courts to go behind the record, and hear proof to the contrary?"

PEARSON, Chief Justice, in this extract from his opinion, says it makes no difference whether the act be *private* or *public;* it is the same. The statutes in question are either *public* or *private*, and are *both* included by the Chief Justice in his statement of the principle.

In *Gatlin vs. Town of Tarboro*, 78 N. C., 119, decided in 1878, the court said, in reference to the same section and article of the Constitution:

"If it appeared from the act itself, or affirmatively appeared by the Journals of the Legislature, which would have been competent evidence, that the notice of the intended application for the intended act, which the Constitution requires, had not been given, we should probably hold the act void. We have not consulted the journals. That was evidence to be offered in the courts below. Probably they are silent as to the fact whether it appeared that the required notice had been given or not. In that case we think the presumption would be that the Legislature had obeyed the Constitution, and that it appeared to it that the notice was given. '*Omnia praesumuntur rite esse acta.*' We cannot accept the agreement of the parties that no notice was in fact given, as proof that it did not appear to the Legislature that the required notice had been given. In such case the best and only proof is by the record. Our opinion on this point is supported by a

recent decision in Illinois (*Happel vs. Brethraner*, 70 Ill., 166)."

The case *Brodnax vs. Groom, supra*, is not cited.

The next case in which the effect of a legislative act as a record importing verity was discussed was in *Scarborough vs. Robinson*, 81 N. C., 409, decided in 1879. In this case the quotation above made from *Gatlin vs. Tarboro* (declared to be a dictum), *was overruled as being repugnant to the doctrine*, enunciated in *Brodnax vs. Groom, supra*, and the doctrine of the earlier cases approved. In this case the court, speaking through Chief Justice SMITH, cited with approval; *Pacific R. R. Co. vs. Governor*, 23 Mo.; 353 *Pangborn vs. Young*, 23 N. J. Law Rep., 29; *Nevada vs. Swift*, 10 Nev., 176, committing the court to the views expressed by the Chief Justice, in *Nevada vs. Swift*, 10 Nev., 176, as follows:

"My general conclusion then is, that both upon the grounds of public policy, and upon the ancient and well-settled rules of law, the copy of the bill attested in the manner above mentioned and filed in the office of the Secretary of State is the conclusive proof of the enactment and contents of a statute of this State, and that such attested copy can not be contradicted by the Legislative Journals, or *in any other manner*."

In this case, Chief Justice SMITH quotes with approval the above quoted words of PEARSON, Chief Justice, in the case of *Brodnax vs. Groom*.

The next case in the state Court, in which the dignity and requisites of a valid legislative act were considered, was *State vs. Patterson*, 98, N. C., 660, decided in 1887. In this case, was directly considered a statute, which had no enacting clause as required by Section 21, Article 2 of the State Constitution, and the State Court held the statute void for this defect, being a *defect ap-*

parent on the face of the act. The court further says, as perhaps pertinent to the matter now under consideration:

"The manner of the enactment of a statute is of its substance. This is so in the nature of the matter, as well as because the Constitution makes it so. If the Legislature should pass merely verbal expression of its will, not in writing, in respect to a particular matter three times, such act would not be a statute or have effect. It must be expressed in writing, or printed, so that it can be seen, read and preserved. A bill perfected and passed is not a statute—it cannot become so until it is authenticated."

The defect in the statute above was apparent upon its face; the defect was the *first thing to be seen* upon an inspection of the act itself. The bill was not perfect within itself. If the bill had passed in its perfect form, it would not have been a statute until something else was done. It must be authenticated. An imperfection in the *form of a statute* can only appear by an examination of the *act* itself.

A bill perfect in form is passed when authenticated. The bills to be entitled acts, when passed in the case at bar, were all in proper and perfect form, and were passed when authenticated.

This case is in no way contradictory of what is said by PEARSON, Chief Justice, and SMITH, Chief Justice, in the cases above cited.

The Supreme Court held in *Scarborough vs. Robinson, supra*, that the signatures of the presiding officers, affixed to the bill, passed while the Legislature was in session, was essential to make it a statute, and for the like and other reasons the enacting clause is likewise essential. *The defect in both cases appeared on the face of the act;* the difference between the two cases consists only in

the fact that in the former, *Scarborough vs. Robinson*, the want of authentication was in the failure of the presiding officer to sign the bill, and in the latter the absence of the enacting clause.

In *Bank vs. Commissioners*, 119 N. C., 214, the act is declared valid as a railroad charter, because passed in regular and perfect form. The court says the certification cannot be impeached by the journals.

In the next place, we call the attention of the court to decisions of the Supreme Court of North Carolina, all before the issue and sale of these bonds, which uphold the validity of municipal bonds, issued in aid of the building of railroads and for other purposes.

In the the case of *Belo vs. Commissioners*, 76 N. C., BYNUM, Justice, says on page 489:

"As soon as the sting of taxation is felt, the self-burdened people cast about for relief, and after some hesitating scruples, plunge into repudiation or other methods involving the sacrifice of public faith with its dismal train of evils." The learned justice adds: "No refuge for repudiation can be found in the legal tribunals of this country. They have sternly resisted every subterfuge to escape the just obligation of these contracts."

In *Street vs. Commissioners*, 70 N. C., 644, Justice READE has declared the courts would not allow technical advantages which involve a breach of faith in the obligation of municipal bonds.

In this case, decided in 1874, the same Justice says:

"Twenty years ago the people voted to subscribe the stock and to borrow money on it—they got the money and built the road, and have had the benefit of it, and now have it. They have recognized the bonds and paid the interest and a part of the principal up to the war. * * * In the impoverished condition of the people it may be hard to pay now, but what can the courts do? They cannot relieve from contracts, nor postpone their fulfillment."

In *Hill vs. Commissioners of Forsyth Co.*, 67 N. C., page 369, the same justice uses language similar to the above.

Also, in *Johnston vs. The Board of Commssioners*, 67 N. C., 101.

All the cases in the Supreme Court Reports of the State prior to 1898—and there are many—some of which will be commented on in another part of this argument, *appear to have assumed* the validity of such bonds as these. The cases, already mentioned, and those to be mentioned, are cited here as *evidence of how such bonds were regarded* during that period.

As further evidence of the existence of a settled course of decision upon this question we will inquire how the decisions during this period impressed the *public*, the *legal profession*, the *corporate authorities*, and the *legislative department of the State*. The public, relying upon the decisions, have invested in these bonds and similar bonds to the extent of at least one-half million of dollars. The records of the Circuit Courts of the United States in North Carolina show over three hundred thousand invested in these bonds, all only recently contested upon the same grounds that are. It is not pretended by any one that any of the these bonds were not issued in good faith. *In every instance* the counties got in return for the bonds the railroads and the improvements for which they were issued.

The legal profession was impressed with the decisions of the court upon this question, because the point was never raised in North Carolina until the decision of the case of *Bank vs. Commissioners of Oxford*, 119 N. C. R., 214, in 1896. There was a period of nearly

thirty years between the decisions in *Brodnax vs. Groom* and *Bank vs. Commissioners of Oxford.*

The records and journals of the Legislative department of the State show how this course of decision had impressed itself upon the law-making power of the State. It is not to be presumed that the Legislature would enact statutes similar to these unless it had been impressed with the decisions of the courts upon the constitutional question involved. The Legislature is not amenable to the suggestion that it would "set a trap for the creditors of the State," as was said by Justice BROWN in the case already cited in this brief.

Nor can it be presumed that the corporate authorities of the counties would have issued the bonds under these statutes if they had not been impressed with the decisions set out in this argument.

We will now show how the Judicial Department was impressed with these decisions. In the case of *Carr vs. Coke,* 116 N. C. Rep., 223, 1895, Justice MONTGOMERY says:

"That instrument [the Constitution] certainly does require that 'all bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws, and shall be signed by the presiding officers of both houses,' and it is equally certain, under the decisions of this court, that the certificate of ratification, attested by the signatures of the presiding officers, carries with it the presumption, conclusive, that all such bills and resolutions have been duly passed by the bodies, and cannot be questioned by the court. Suppose, as individuals, we admit—which the answer does not--that this bill did not pass its several readings, can that fact be shown in a court of law in the face of ratification and the genuine signatures of the presiding officers certifying to the contrary? This is the naked question. Ratification gives authority to the act. The presiding officers who, upon ratification, attach their signatures to the bill, do it in open session, calling attention of the members to the fact that the

same is about to be signed, and reading the title to the bill. When it is signed, ratification is thereupon made of it by the body through their agents, the presiding officers. It is their act and deed, and nothing, not even the Journal itself, can contradict it or be used as evidence against it. *Ratification* is of higher dignity and of more authority than the *journals* kept by the clerks. Ratification and the signatures of the proper officers presume a passage of the bill by the Legislature *according to the requirements of the Constitution and the courts of law—the judicial department, a co-equal department—are not allowed to go behind or question them.* **We have clear authority for this in our reports."**

On page 235 of volume 116, N. Car. Reports, in this case of *Carr vs. Coke, decided in 1895*, Chief Justice FAIRCLOTH, in the leading opinion of the court, says :

" At common law, the ratification and approval of an act of Parliament, thus made, is the highest exercise of the highest authority that this kingdom acknowledges upon earth.

" The journal is of good use for the intercourse between the two houses, and the like, but when the act is passed the *journal* is expired."

The Chief Justice then cites *Brodnax vs. Groom*, and quotes the language of PEARSON, Chief Justice, already copied in this brief. He also cites *Scarbrough vs. Robinson*, 81 N. Car., and quotes from the opinion of Chief Justice SMITH in that case, " to show," as he says, " the trend of the judicial mind of the court as then constituted."

In the case of *Commissioners vs. Snuggs*, as already referred to in this brief, FAIRCLOTH, Chief Justice, in his dissenting opinion, on page 407, of volume 121, says :

" My reasoning is stated in *Carr vs. Coke*, 116 N. Car., 223. In that case it was held that, when a bill had been signed by the presiding officers of the As-

sembly, the court cannot go behind such ratification to inquire how the bill was passed. The ratification is a record, and concludes the matter."

Again he cites *Brodnax vs. Groom* as decisive of the question presented. This was in 1897, *the first time the doctrine in Brodnax vs. Groom was ever departed from, or even questioned*, except, in 1896, in the case of *Bank vs. Commissioners*, 119 N. C., 214, six years after the issue of the bonds by Wilkes County, and after the interest had been collected, five years in succession, and paid to complainants and the other bondholders by these same corporate authorities, every year, when due, for four years. In the closing paragraph of his opinion, on page 410, Vol. 121 N. C. R., the Chief Justice says :

" They have recognized and paid the annual interest on these bonds for several years without objection, and it is *possible* that they never discovered the absence of the words ' yea ' and ' nay ' on the journals until since the decision of this court in *Bank vs. Commissioners*, 119 N. C., 214, decided in 1896."

Here, in this case, *Commissioners vs. Snuggs*, the *Stanly case*, the Chief Justice, in his dissenting opinion, says the reason for his dissent is stated by him in the case of *Carr vs. Coke*, in the leading and ruling opinion of the Court, Justice MONTGOMERY filing a concurring opinion, from which the above extract is taken.

At that time, 1895, six years after these bonds were issued, and had come into the hands of complainants, we see the Supreme Court of the State was impressed with the fact that there was a settled course of decision, such as we contend for upon this question in this State.

The settled rule was, *so far as this State was concerned*, to which there was no exception, that, when any "act is passed, the *journal* is expired."

If, then, upon the passage of an act, the journal is expired, how can that journal be used as evidence in this case?

In the case of *Bank vs. Commissioners of Oxford*, 116 North Carolina Rep., on page 368, the first time it was before the Court, February Term, 1895, the Court say, *there being no dissent:*

"The purchaser of such coupons as those sued upon must so far act upon the notice contained in the recitals, as a general rule, as to examine *the statutes referred to*, and ascertain, at his peril, whether the essential prerequisites to the validity of the bonds have been met, both by Legislative and popular action. *We hold that, upon a fair construction of the organic law, and pertinent statutes, and their application to the facts of this case*, there *has been a sufficient compliance with the essential requirements of the law to render the election valid. We think, therefore, that the Court erred in holding that the plaintiff* was not entitled to recover, and the judgment of non-suit must be set aside and a new trial granted."

This was the expression, upon the question presented here, of the mind of the Supreme Court early in 1895, and was in accordance with what had been understood by everybody to be the settled course of decision in North Carolina for nearly thirty years, ever since the decision of *Brodnax vs. Groom*, 64 N. C. R., 244. It shows how the Court was impressed in 1895.

At the September Term of the Court for the year 1896, more than a year after the decision in this same case, from which the above extract is taken, *Bank vs. Commissioners of Oxford, again came before the Court*, by appeal on part of defendant, the Board of Com-

missioners of Oxford; and the Court, *for the first time within its history*, held it to be incumbent upon a bondholder, purchasing for value in good faith, to look to the journals of the houses of the Legislature to see if the yeas and nays had been entered thereon in accordance with the requirements of the Constitution.

119 N. C. R., 214.

The Chief Justice, dissented from the judgment of the Court, showing it to be contrary to, and in violation of, a settled course of decision, which had obtained in the State since 1868, the date of the adoption of the Constitution, which settled course of decision had impressed itself upon the public, upon the legal profession, upon the Legislative Department, the Judicial Department, the corporate authorities of the Counties of the State, and upon the purchasers of and investors in corporate and municipal bonds, both in this State and other States.

Here, indeed, was a new point taken, a new point presented, for the first time in this State, upon which repudiation of honest debts was to be justified; upon which bonds bought, in due course of trade, for value, at the highest market price, issued in good faith with no suggestion that the Counties did not get full return for them, are to be repudiated.

The case of *Douglass vs. County of Pike*, 101 U. S., is strikingly in point. It was a bond case and the bonds were sustained as against a decision of the Supreme Court of the State made after the bonds were put out that the enabling Towship Aid Act was *unconstitutional.*

At page 679 Chief Justice WAITE says:

"We are asked to reconsider our decision in *County of Cass vs. Johnston* (95 U. S., 360) because since that case

the Supreme Court of Missouri, in *State ex rel. Woodson vs. Brassfield* (67 Mo., 331), and *Webb vs. Lafayette Co (id., 353)*, has held the township aid act, which we sustained, to be unconstitutional. The question presented, as we view it, is not so much whether these late decisions are right, as whether they should be followed in cases having reference to bonds put out and in the hands of innocent purchasers when they were announced. In the *Cass County case* we said that the Supreme Court of the State had often been called on to construe and give effect to the act, and had never before that time, in a single instance, expressed even a doubt as to its validity. We have again examined all the cases and find that what we then said was true. Judge DILLON, who filled the office of Circuit Judge in the Eighth Circuit with such distinguished ability during nearly all the time the act was in operation, from its original passage until after the recent decisions, remarked in *Westerman vs. Cape Girardeau County*, 7 Central Law Journal, 354: 'A hundred cases—and I do not think I exaggerate—have been brought on these township bonds in the Federal Courts of this State, and prior to the decision in *Harshman vs. Bates Co.* (92 U. S., 569) none of the able lawyers defending these cases even made a point that the Act of March 23, 1868, was unconstitutional.' The reason is obvious."

In the same case, on page 687, the Chief Justice further says:

"We have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper."

On page 258, Vol. 116 N. Car. R., one of the two Justices who delivered dissenting opinions in the *Oxford Township case* in the year 1895, five years after these Wilkes County bonds had come into the hands of the complainants and after the county had *many* times paid the interest on the same, says:

"Looking at the case from the standpoint of my brethren, it appears from a brief of cases involving the

question whether the ratification can be contradicted by the journals, which will be found in the notes on pages 661-667 of Volume 143 of the United States Reports, that in twenty-eight of the States the courts have held that it is competent to impeach the ratification by the journals, directly; while it is held to the contrary in but nine States."

We turn to the volume mentioned by the Justice and find, on page 665, included in that brief, the following: "North Carolina—In North Carolina it is held that the enrolled act is conclusive (*Brodnax vs. Groom*, 64 N. C., 244; *State ex rel. Scarborough vs. Robinson*, 81 N. C., 409)."

That brief was prepared by the Attorney-General, Mr. Miller, and the Solicitor-General, Mr. Taft, afterwards Circuit Judge of the United States.

In the dissenting opinion of the other Justice in *Carr vs. Coke*, above cited, we find, on page 266, the following:

"In other States questions have come up as to the power to go behind the certificate of ratification, signed by the speakers in cases of minor irregularities, and it has been held in twenty-eight States that this can be done." "In nine States only it has been held that the certificate of ratification is conclusive against irregularities. These cases need not be here cited and reviewed. They are easily accessible in the 23 Am. and Eng. Enc., 196, *et seq.*"

We turn to the volume cited by the learned Justice and find, on page 196, *et. seq.*, the following—First, on page 202:

"(1) First view—Conclusiveness of Bill. The first view is that the enrolled act, signed by the presiding officers of both houses and by the executive, is the sole expositor of its own contents, and the conclusive evidence of its existence and valid enactment, and that it is not allowable to look into the journals of the houses, or to other extrinsic sources for the history of the act

or its provisions or to attack the manner of its enactment." On same page, in a note, we find the following: "2. The following authorities tend to support this view." Page 206: "North Carolina. *Brodnax vs. Groom*, 64 N. Car., 344; *State vs. Robinson*, 81 N. Car., disproving *dictum* in *Gatlin vs. Tarboro*, 78 N. Car., 119."

The facts giving rise to this decision were that a duly authenicated act was sought to be impeached by the Journals, showing that in the House the bill was tabled on the second reading, and that in the Senate no such bill was introduced. As to what this case decided and the far-reaching importance of the doctrine enunciated in the opinion, we will give the views stated by the Supreme Court of Kentucky in the case of *Lafferty vs. Huffman*, 32 L. R. A., 203, speaking through Justice HAZELRIGG. The learned Justice says:

"In the recent case of *Carr vs. Coke* (1895), 116 N. C., 223, the case was considered as one of new impression in that State, and, after what seems to us a very satisfactory course of reasoning and a review of the principal authorities, the conclusion was reached that 'when the Legislature had solemnly certified to a fact—that is, to the passage and ratification of an act which is within its own sphere'—the judiciary will not be permitted to inquire into or dispute that certification."

Thus, this was the North Carolina doctrine down to 1895. But in 1896 the court held otherwise for the first time, in the case of Bank vs. Commissioners of Oxford, 119 N. C. R., 214, 1896, saying:

"This case has no analogy to *Carr vs. Coke*, 116 N. C., 223. That merely holds that when an act is certified to by the speakers as having been ratified, it is conclusive of the fact that it was read three several times in each house and ratified. And so it is here, the certificate of speaker is conclusive that this act passed three several readings in each

house and was ratified. The certificate goes no further. It does not certify that this act was read three several days in each house and that the yeas and nays were entered on the journals."

It may be repeated that no such facts are required by any provision of the Constitution, nor of any statute nor by any parliamentary usage, to be certified. We respectfully submit that the scope of the decision of *Carr vs. Coke* is not *fully stated* by the learned Justice, as the quotation from it or the readings of the opinions show. If *Carr vs. Coke* had no analogy to the case of *Bank vs. Commissioners*, why, may we ask, did the learned Justice, speaking for the majority of the court, in *Bank vs. Commissioners*, in his *dissenting opinion*, in *Carr vs. Coke*, refer to the many cases relied upon in *Bank vs. Commissioners ?*

Here we see the learned Justice, in his opinion, speaking for the majority of the court in *Bank vs. Commissioners*, using and relying on the authorities and precedents in *support* of the same that he used and relied on in his *dissenting* opinion in *Carr vs. Coke.* Then, how can that Justice say the two cases have no analogy to one another ? According to his *arguments* and *authorities* and *contentions*, as they appear in the opinion in the Bank case, and in his dissenting opinion in the *Carr vs. Coke* case, *both* cases involved the *same principle.*

The Chief Justice, who delivered the opinion in the case of *Carr vs. Coke*, in his dissenting opinion in *Commissioners of Stanly Co. vs. Snuggs*, 121 N. C. R., on page 407, says :

" My reasoning is stated in *Carr vs. Coke*, 116 N. Car., 223. In that case it was held that, when a bill had been signed by the presiding officers of the Assembly, the court cannot go behind such ratification to

inquire how the bill was passed. The ratification is a record, and concludes the matter."

Again he cites *Brodnax vs. Groom* in support of his opinion. He also had dissented in *Bank vs. Commissioners*, 119 N. C.

This shows the *Chief Justice* was impressed with the idea that the *principles* in *Carr vs. Coke* and *Bank vs. Commissioners* and *Brodnax vs. Groom* were analogous.

In the opinion of his Honor Judge GOFF, speaking for the court in *Board of Commissioners Stanly Co. vs W. N. Coler & Co.*, decided August 11, 1899 (96 Fed. R., 284), is the following:

"The contention of the appellees that there were prior adjudications of the Supreme Court of North Carolina inconsistent with the decisions of that court in the cases of *Union Bank of Richmond vs. Commissioners of the Town of Oxford* and *Board of Commissioners of Stanly County et al. vs. Snuggs, supra*, which had become rules of property and which were overruled by those decisions, is not sustained by an analytical examination of the cases referred to, and, in our opinion, that court has not, in any of the cases called to our attention, enunciated a doctrine really in conflict with its decisions in the two cases we have last mentioned. **It is true that in some instances the language used by the court is misleading in its tendencies, and even susceptible of the said construction so placed upon it;** but a careful consideration of the cases and of the facts to which they relate forces the conclusion that the court had no intention of including within the purview of its judgment bills of the character of those embraced by the provisions of Art. 2, section 14, of the Constitution of the State of North Carolina."

The decisions we have cited here *as evidence* of the settled course of decision which obtained in North Carolina at the time and before the issue and sale of the bonds in question, are treated by His Honor Judge GOFF as if we had cited them as *authorities.* With the highest possible respect for the Circuit Court of Appeals and for the writer of the opinion, it seems to us that there was a total misconception by the Court of our purpose in citing the cases suggested. As we have said, these cases were brought to the attention of the Court *as evidence of the settled course of decision* contended for.

They seem to have impressed the Circuit Court of Appeals as "being susceptible of the said construction so placed upon them," as appears in the extract above written from the opinion of Judge GOFF.

It was hardly to be supposed that a bondholder, before his purchase of a bond in due course of trade for value and in good faith put upon the market by the corporate authorities of the County issuing the same, would make "an analytical examination of the cases referred to" before purchasing the bond, and especially so, in view of the recitals in the bond and the well-understood rule, as laid down in *Bank vs. Commissioners*, in Vol. 116, N. C. R., page 368, already quoted in this argument.

If these cases referred to *were susceptible of the construction placed upon them*, as said by his Honor Judge GOFF, then in favor of the bondholders purchasing in good faith, it seems to us the duty of the Court was to give them that construction *(Louisville, &c., Ry. Co. vs. Louisville Trust Co.*, 174 U. S. R., 573 and 574*)*.

What was said by Justice GRAY in this Louisville

case, and also in *Merchants' Bank vs. State Bank*, 10 Wallace, 604, was the well-understood rule, and laid down to be such, in *Belo vs. Commissioners of Forsyth County* in 1877, the leading case upon municipal bonds in North Carolina—one which has been cited many times in our Courts, and always with approval (Vol. 76, N. C. R., 489).

We call to the attention of the Court the cases of *McDowell vs. Construction Co.*, 96 N. C. R., 514, and *Goforth vs. Construction Co.*, in same volume, 535, and to the cases cited therein, as evidence of how such bonds as these in question were regarded in North Carolina in 1877 when they were decided.

In *McDowell vs. Cons. Co.* and *Goforth vs. Cons. Co.*, above referred to, it was contended that the bonds issued by the Counties of Cleveland and Rutherford were void because of irregularity of the elections; and, although the requirement in Article 2, Section 14, of the Constitution, was not complied with, no point was made upon it. These cases were abandoned by the plaintiffs, and, upon failure to pay the interest upon the bonds, suits were brought in the Circuit Court of the United States, in 1888, upon the coupons, at Charlotte, North Carolina, to compel payment of the same. In these suits there was no suggestion of the point raised by respondents in the case at bar.

The bonds issued by the Counties above referred to were adjudicated valid and legal bonds by the Circuit Court of the United States, and in obedience to such adjudication the interest on the same has been paid regularly ever since.

In 1895, the case of *Carr vs. Coke*, before referred to, was decided by the Supreme Court of North

Carolina, to the effect that not even *for fraud* was it competent to go behind the ratification and enrollment of a bill to show it had not been *read three times*, as the Constitution requires. One of the requirements of Article 2, Section 14, of the Constitution, was that there should be three readings, and that the journal should show that fact. Such being the case, can it be assumed, or supposed, that the Court would hold it not competent to introduce the journals to show the *three readings;* and that it was competent to show, by the journals, the fact that the yeas and nays had not been entered thereon?

No bondholder, no corporate authority, no part of the legal profession, no department of the State government, no part of the public, would ever so conclude. It would appear to all, and would be so regarded by all, that the Court decided that case in the light of this settled course of decision as we insist it obtained in the State.

Now we have shown these decisions in our State for a period of twenty-five years.

We have shown an unbroken current of decisions for a longer period, upholding bonds similar to the bonds in question.

We have shown how these decisions have impressed the legislative department of the State, and how that department of the government continued, from time to time, to enact statutes of a like kind in the same manner.

We have shown how the corporate authorities of the counties regarded these statutes, and the bonds they issued under them, from time to time.

We have shown how these decisions impressed the public, and how the public invested money in the bonds

issued under the same, regarding them as valid bonds, and relying upon their validity in good faith.

We have shown how the legal profession in State and other courts outside of the State have been impressed by these decisions.

And we have shown how the judicial department of the State was impressed by these decisions, not only in the State, but beyond the limits of the State.

These are facts established, and we contend, as a matter of law, this court will hold they constitute a settled course of decision.

We insist further that this court will, in the light of these facts and the law, as laid down by Justices GRAY and BROWN, in the cases cited herein from the 174 U. S. R., follow this course of decision. If the "court *can do so, under any circumstances*," it will uphold these bonds.

The Convention Ordinance of March 9, 1868, and the Amendatory Acts and their judicial construction prior to the issue of the Wilkes County bonds, are full authority for the issue of these bonds.

In the next place, we come to the ordinance of 1868, incorporating the North Western North Carolina Railroad Company, and to the statutes and sections of the Code of North Carolina, all set out in full in the bill and printed record. The ordinance is the charter of the company, "and by section 12 of the charter," says BYNUM, Justice, in *Belo vs. Commissioners*, 76 N. C., page 490, "the same power to subscribe to the capital stock of the company and subject to the like regulations and restrictions is given to *counties and towns* as was conferred by an act incorporating the Atlantic and

North Carolina Railroad Company passed by the Legislature of 1852."

"By section 34 of the latter act," says the Justice, "an election was held in the county of Forsythe and the subscription made and bonds issued and the same put upon the market and sold to the purchaser at his banking house in Salem, N. C., on *the 5th of March, 1869.* The bonds recited that they were authorized by an ordinance of 1868 by an order of the Court of Common Pleas and Quarter Sessions of Forsythe county, at June term, 1868, and re-enacted and ratified and confirmed by an act of the General Assembly, ratified the 11th of August, 1868."

The board of commissioners of Forsyth county in 1872 "refused to assess any further tax to pay interest upon the bonds, alleging as the reason therefor that the subscription of stock so made by the county was illegal and void."

The bonds were declared to be legal and valid by the Supreme Court in this case.

It is *under this same charter* that the North Western North Carolina Railroad Company *extended its road* as further authorized and provided for in an act to amend this charter as printed in the record, which amendment, as the act shows, "was read three times in the General Assembly and ratified the 20th day of February, A. D. 1879." (Record, p. 30.)

In the body of the bond are these words: "This bond is issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, A. D. 1879, entitled "An act to amend the charter of the North Western North Carolina Railroad for the construction of *a second division* from the towns of Winston and Salem, in Forsyth county, to the Yadkin Valley by Wilkesboro to Patterson's factory, Caldwell county," and authorized by a vote of a

majority of the qualified voters of Wilkes county." (Record, p. 24.)

In the printed record is "An act to authorize the North Western North Carolina Railroad Company to *extend its road and to build branches thereof.*" This act shows on its face that it was "read three times and ratified this 2d day of March, A. D. 1881." (Record, pp. 30, 31.)

Section 13 of the charter authorizes the company "to construct *branches* of said road, *one* of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry County, to the line of the State of Virginia."

By Section 12 of the charter the powers and authority are conferred to subscribe and issue bonds, and under the same regulations and restrictions, as that given to *counties* and towns by an act incorporating the Atlantic and North Carolina Railroad Company, passed in 1852. *This is so held by the Supreme Court, on page 490, 76 N. C. in Belo vs. Commissioners, 1877.* It is not denied that Section 34 of the Act of 1852 gave to the counties and towns along the line of the Atlantic and North Carolina Railroad the power to issue bonds in payment of subscriptions to stock. This is so held in the same case (see p. 31 of record for Act of 1852).

Then we see that the "*charter*" (the ordinance of the convention) *in express terms* makes the charter of the Atlantic and North Carolina Railroad Company a part of the charter of the North Western North Carolina Railroad Company so far as it relates to the subscription of counties to the capital stock of the company. This being so, the charter of the Atlantic and North Carolina Railroad Company is to be read and considered as a part of the charter of the North Western

North Carolina Railroad Company *(Range Co. vs. Carver*, 118 N. C., 328; *Commissioners vs. Higginsbothern*, 17 Kansas, 62*)*. It is like an instrument referring to another instrument—*Flaum vs. Wallace*, 103 N. C., 296—or where the complaint in one action refers to the complaint in another action for *data—Alexander vs. Norwood*, 118 N. C., 381—" they are to be read and considered as one instrument."

We have shown that the subscription to this same company, made by Forsyth County, under the charter as originally passed, has been upheld by the Supreme Court *(Hill vs. Commissioners*, 67 N. C., 367, 1870; *Belo vs. Commissioners*, 76 N. C., 487, 1877*)*.

The Constitution of 1868, framed by the Convention that passed the ordinance of incorporation of this company, its charter, went into effect on the 22d or 24th of April, 1868.

" By this Constitution, and subsequent legislation, the County Court was abolished, and the county commissioners succeeded to their powers." This is held so in *Belo vs. Commissioners, supra.* In Wilkes County, into which this railroad runs for over 20 miles, the commissioners, who were the successors of the justices, made the subscription to issue the bonds in question, as they were clearly authorized to do.

It can nowhere be shown that the charter of this railroad company has been repealed, nor is it pretended that, unless it is repealed, these bonds are not issued in accordance with the Constitution. See the dissenting opinion of Justice FURCHES in the case of *Commissioners vs. Call*, 123 N. C., page 327. This opinion is concurred in by the Chief Justice, who says: " I concur in the dissenting opinion."

In this connection we call the attention of the court to what Justice GRAY says in *Folsom vs. Ninety-six*, on page 627, Vol. 159, U. S. R., in speaking of the ground on which the majority of the court in the case decided by the South Carolina Court based the decision, in which the Act of Assembly of that State was declared unconstitutional. In giving his reason for not following the decision of the State Court, the Justice says: "We are unable to concur in that view, and are much better satisfied with the reasoning of the dissenting opinion."

We think this court will, upon reading the opinion of Justice FURCHES, be "much better satisfied" with it than with the opinion of that Justice who wrote the opinion of the majority of the court. And when these two opinions shall have been read, and their reasoning considered, this court will follow the rule laid down by Justice GRAY, in *Louisville, &c., vs. Railway Company*, 174 U. S., pages 573 and 574.

"Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them" (10 Wall., 644, 645).

We have seen that this principle applies to municipal bonds in a former part of this brief.

On page 27 of the record, sections 12 and 13 of the charter give this corporation "power to construct branches of" the road, and conferred the authority and

power, given in Section 33 of the Act of 1852, as will be seen on page 31 of the record.

This is expressly held by the Court, in *Belo vs. Commissioners*, 76 N. C. R., on page 490, the leading case in North Carolina, on municipal bonds. In the light of this holding, how can it be said that there was no power conferred upon the County of Wilkes, to issue these bonds ?

This power conferred, was not only a power of the County, and counties, granted by the charter, *but was a privilege of the Company (County of Scotland vs. Thomas,* cited *infra).*

In further consideration of the ordinance of the Convention of 1868, the charter of this railroad company, we see that it gave the power to build branches of the road in *any* direction, and we see that the statutes, relied on by the complainants were amendments to the charter, and gave no *powers not already conferred by the charter itself upon the company and counties, towns and cities.*

We see, also, that the charter was granted in 1868, before the Constitution went into effect, and the statutes printed in the record, and amendatory of the same, passed after the Constitution was adopted.

Here we ask a consideration of the case of the *County of Scotland vs. Thomas*, 94 U. S. R., page 682.

On page 689 of the Volume, in that case, Justice BRADLEY says:

"The specific question in the present case, therefore, is, whether the authority given to counties and towns in 1857, to subscribe to the capital stock of the Alexandria and Bloomfield R. R. Co., has become extinguished by the subsequent consolidation of that company with other companies, irrespective of the Constitutional provisions referred to."

Justice BRADLEY says, also, on page 688, after quoting the words of the Constitution of Missouri, similar to the words of the North Carolina Constitution of 1868, that "This prohibition, it will be observed, is against the Legislature's authorizing municipal subscriptions or aid to private corporations; *it does not purport to take away any authority already granted.*"

On page 693 Justice BRADLEY goes on to say: "But the case has other aspects, which it is necessary to take into consideration.

* * * * * *

"The project of the railroad promised a great public improvement, conducive to the interests of Alexandria and the counties through which it would pass." "The power was sought at the hands of the Legislature, and was given." "It was relied on by those who subscribed their private funds to the enterprise."

Speaking of this power, he says: "Why it should not still attach to this portion of the road as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or *otherwise*, it is difficult to see. * * * Subscription to the stock *was not only a power of the county, but a privilege of the company.*"

This is the view taken of this question, by BYNUM, Justice, in *Belo vs. Commissioners*, and FURCHES, Justice, in his dissenting opinion in *Commissioners vs. Call*, before referred to.

We venture to call the attention of the Court specially to *Belo vs. Commissioners*, and to the case of *County of Scotland vs. Thomas*, 94 U. S. R., page 682.

It should not be forgotten that the bonds in suit were issued in good faith, by the corporate authorities of Wilkes county, and purchased in equally good faith, by the bondholders, complainants in this bill, and their issue authorized by a large majority of the qualified voters of the county.

It is true also, that the purchasers of these bonds for value "*were unaware of any defect of authority, or other irregularity*, on the part of those acting for the

county," and there was nothing to excite suspicion of such defect or irregularity, if any did exist.

It is equally true that the county has for years enjoyed the benefit of the railroad built, and operated within its limits, for over twenty miles. It is not suggested even, that the building of this road was not, in all respects, satisfactory to the people of the county. Good faith on every hand prevailed, and was practiced.

As we say, all these facts are admitted, substantially as herein set out.

Then, it cannot be denied that, to uphold the bonds, will work no wrong, do no injustice, to any one. The county of Wilkes got what it wanted, and is not dissatisfied with it.

How is it on the other hand? To invalidate the bonds will be to do an injustice; to take from an innocent purchaser in good faith a commercial value, for which he paid his money.

Then we submit this is not the court in which to come and ask in vain that these securities be upheld.

When we read the case of the *Louisville Railway Co. vs. The Louisville Trust Co.*, in Vol. 174 U. S. R., 573 and 574, we find that Justice GRAY, in writing the opinion, had in his mind a case of this kind.

If it be contended that the late decision of the case of *Commissioners vs. Call*, 123 N. C. R., 308, 1898, in the State Court is a bar, a *res adjudicata* here, as was done in the *Stanly case*, we submit it is not.

In the case of *Carroll County vs. Smith*, a judgment had been given in favor of the county in a State Court, between it and certain of its bondholders, and it was *held to be no estoppel on holders of bonds who were not before the court. It has also been held that they cannot be made*

parties, and bound by publication made for them as unknown defendants.

Carroll Co. vs. Smith, 111 U. S., 563.
Pana vs. Bowler, 107 U. S., 544–45.
Brooklyn vs. Ins. Co. 99 U. S., p. 370.
Empire vs. Darlington, 101 U. S., p. 92.

Commissioners of Wilkes Co. vs. Call, 123 N. C. R., 308, 1898, was ex parte, if not collusive.

This is the law, even assuming that the case of *Commissioners vs. Call* was not a collusive one. It seems to us, however, that it is collusive, and it is hard for any one to read this record without so concluding. We refer to this to show there was no sentiment in the county in favor of the repudiation of this debt. Read the answer of Call, in this suit, on page 20 of the record; read what Justice FURCHES says in his dissenting opinion, already referred to; read the agreement of counsel for the defendants in the State Court, on page 48 of the record in case of *Turner vs. Commissioners of Wilkes County*, heretofore filed in this Court, and the remarks of Justice FURCHES concerning that agreement; and read, on page 33 of the record, what appeared in the opinion of the court, as certified to the Supreme Court of the United States, and read the brief of the counsel for the plaintiff in error in said *Turner case*, and note a failure therein to call the attention of the Supreme Court of the United States to the mistake of the court, in that opinion, concerning the most important matter in the record.

There were no adverse parties in the suit after Call, the original defendant, refused to perfect his appeal to the Supreme Court of the State.

It will be hard for the Court, in the light of the record, to escape the conclusion that the case was one gotten up for the purpose of repudiating this honest debt of Wilkes County.

Justice DOUGLAS, in his opinion of the said case of *Commissioners vs. Call*, 123 N. C., 308, concerning these Wilkes County bonds, said:

"The bondholders themselves *could* have become parties to any such proceeding, and *would* have been gladly heard by us, but the mere fact that *they deliberately refrained from any participation in the defense*," etc., etc.

The learned Justice thus shows that he did not believe from the record that Turner and Wellborn were *bona fide* holders of even one bond, or that they actually participated in the defense of the case in the State Court.

The Code also gave authority to issue these bonds.

In the order in which we have arranged this argument the complainants further contend that the issuance of the bonds is authorized under Sections 1996 and 1997 of the Code of North Carolina (Record, p. 38).

The Code of North Carolina is one act (Code, Section 3876), and went into operation November 1st, 1883, (Code, Section 3866).

At the end of volume 2 of the Code, at bottom of page 603, *it is declared that the requirements of Sec.* 14, Article 2, of the Constitution of North Carolina, have been complied with in the passage of the Code; and this is also admitted.

The bondholders are not estopped by the recital, in the face of the bonds, that they were issued under the provisions of the act of 1879, *provided it can be shown* that the commissioners of Wilkes county, in ordering the election and issuing the bonds, *acted also* under the provisions of sections 1996 and 1997 of the Code.

It is apparent that they did. They gave notice of exactly thirty days, the time required by section 1997 of the Code; the order speaks of the matter to be submitted as a "proposition," the word used in said section. *Besides, article 21 of the complaint declares that these bonds were, as a matter of fact,* issued under the provisions of these sections, as well as of the charter and the amendatory acts of 1868, 1879 and 1881. And article 21 of the answer does *not deny* this fact, but merely denies the *legal conclusions* arising from said admitted fact.

So it is admitted that the Board of Commissioners was proceeding under the provisions of sections 1996 and 1997 of the Code, as well as under the acts set out in the record and under the charter. If this be true, then the bonds are valid, notwithstanding the recitals in the bonds, provided the Code provisions conferred the power to issue them on the board.

Knox Co. vs. Ninth Nat. Bank, 147 U. S., 91.
Cairo vs. Zane, 149 U. S., 122.
Anderson, &c., vs. Beal, 113 U. S., 227.

But the respondents contend that these sections did not authorize the issuance of the bonds for the following reasons:

I. "Because said statutes are not local and special as required by sections 1, 6 and 7 of the Constitution of North Carolina."

The conclusive answer to this is that there is not a particle of evidence of any kind to be found anywhere in the record that the payment of the interest or principal of these bonds will require a county tax to exceed the double of the State tax. But, further, under the decisions of the Supreme Court of North Carolina this constitutional provision does not affect the validity of the bonds, and in no view of the case could affect more than the method of having a valid, existing and binding obligation *paid.*

" The legislative practice has uniformly been, as far as we know, to give approval in advance, and thus confer the requisite legal authority to levy special taxes beyond the assigned limits, though, if given after the levy, it would doubtless be equally effectual" *(Cromartie vs. Commissioners,* 87 N. C. Reps., on p. 140).

And in *Herring vs. Dixon,* 122 N. C., on page 423, the Supreme Court of North Carolina again distinguishes between the power to contract a valid indebtedness without special legislative sanction and the power to levy a tax to pay said indebtedness when it says: " In *Vaughn vs. Commissioners,* 117 N. C., 429, while it was held that the commissioners could *incur a debt* for necessary expenses, without a vote of the people, it was not held that they could *levy a tax* in excess of the constitutional limit to pay it without special approval of the legislature."

So under the rulings of *Cromartie vs. Commissioners* and of *Herring vs. Dixon* the commissioners have the right to contract a valid debt without a special act, but only the process of collecting its payment would be affected by section 6, article 5, of the Constitution.

But this argument is useless, as the record contains no evidence whatever that the payment of this obliga-

tion by the county will require a tax exceeding double the State tax.

Subscriptions to railroads, under General Statutes similar to section 1996, have been upheld by the Supreme Court of the United States:

"Where a State law confers a general power on a county to subscribe to the stock of any railroad in the State for any amount not exceeding $100,000, the county may subscribe to the stock of two railroads $100,000 each" (*Chicot County vs. Lewis*, 103 U. S., 164).

In *Davies vs. Huidekoper*, 98 U. S., 104, the court upholds a subscription under a General Statute of Missouri almost identical in language with section 1996.

The following are sections 1996 and 1997 of the Code of North Carolina:

Section 1996 of the Code of North Carolina.

"The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest."

Section 1997 of the Code of North Carolina.

"The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and, if a majority of the board shall vote for the proposition, this shall be entered upon the record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And, if a majority of the

qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company or companies. Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper."

Re the "interest of the citizens of the county."

The appellants further contend "that said sections of the Code failed to authorize the issue of said bonds, because said North Western North Carolina Railroad was not, within the meaning and proper construction of section 1996 of the Code, one in which the citizens of the County of Wilkes had an interest."

Aside from the common sense of the matter, the grammatical construction of section 1996 forbids the interpretation put on it by appellants; to wit, that, before a vote could be taken by the citizens of Wilkes County, the said citizens must have a direct pecuniary interest in the road; that is, must be stockholders in the road. The words of the statutes are "in which the citizens of the county may have an interest."

The words are not "citizens of the county may have an interest," or "certain citizens," but "*the* citizens of the county."

So, if the pecuniary interest is meant, *every citizen* of the county must have stock before a county subscription could be voted, which is a *reductio ad absurdum*. But, if this was meant, the statute should have read, "in which the citizens of the county may

have interests." So that, assuming that this interest means a pecuniary interest, every citizen of the county must have stock, and that stock must be "an interest," or, in other words, that stock must constitute only one interest, one block of stock, owned in joint ownership by every citizen of Wilkes County—a palpable absurdity.

It is clear that the interest spoken of is the interest that the citizens of the county might have in any public improvement.

"What else does this doctrine mean, if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has already been held a public one is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals, when they obtain their power to construct it from legislative grant" *(Olcott vs. Supervisors*, 16 Wallace, 678*)*.

Re the "completion" required by the Code.

It is also objected by the attorney for the County Commissioners, "Nor was the subscription made necessary to aid in the completion of the same" [that is, the railroad].

The North Western North Carolina Railroad was begun to be built in October, 1868, and was finished to Winston, N. C., in 1872 or 1873; and, on November 6th, 1888, when the bonds were voted, work was going on on that part of the road from Winston to Wilkesboro. This fact is shown by affidavits in the record in the Circuit Court of Appeals, and omitted from certified record by mistake.

It will be admitted, however, by appellants' solicitors. Indeed, it is a matter of public notoriety.

The sections 1996 of the Code were first enacted into law April 10th, 1869, about six months after the work had been commenced on the North Western North Carolina Railroad.

The statute of April 10th, 1869, was re-enacted in Battle's Revisal and went into operation January 1st, 1874; it was again re-enacted in the present Code of North Carolina, and went into effect November 1st, 1883. So that, if the word "completion" be construed in its strictest sense, these bonds voted for on November 6th, 1888, were voted in aid of the completion of an unfinished road, of a road upon which the work of construction was going on on the very day these bonds were voted by the citizens of Wilkes.

"No reasonable construction of this act will require that the road to be aided should be actually built before the county was authorized to give it aid. That theory would, no doubt, add greatly to the security of the county and would relieve it from many of the perplexing questions which so commonly arise. If, however, the road were actually built, no aid would be needed in its construction. The aid might, in that event, be useful to its stockholders, or might relieve it from embarrassments, but a road which is built can neither need nor receive aid in its construction. That is a fact accomplished" (*Kenicott vs. Supervisors*, 16 Wallace, 452).

These objections to the giving of the power to the board to issue the bonds by sections 1996–2000 have been made by the county in Article 21 of their answer.

Another defense has been urged in and sustained by the State Court, to wit: That the provisions of section 1996 refer to only these roads that were *unfinished in April, 1868, the time of the adoption of the constitution of 1868.*

"This reasoning leads us to the still farther conclusion that, at the time when the act of 1868–9 was

brought forward in the Code, section 1996, and the four succeding sections, it could have had reference to no cases, except those where the counties had a pecuniary interest in unfinished railroads at the adoption of the Constitution of 1868" *(Commissioners vs. Snuggs*, 121 N. C., on page 403, 1897*)*.

This was first decided in 1897 and is one of the most astonishing legal solecisms into which so able a court ever fell. The statute of April 10th, 1869, section 1996 of Code, made no refer ence to the Constitution of 1868, nor to any other point of time in the past. Every word in section 1996, denoting tense, is in the future tense, and the Code went into effect November 1st, 1883.

It is an universal rule of construction that all statutes are prospective in their operation, unless the statute itself says to the contrary.

"No statute should be given a retrospective operation, unless its words expressly require such construction" *(State vs. Littlefield*, 93 N. C., 614*)*.

What words in section 1996 require that its operation be referred back to April, 1868, fifteen years before it was re-enacted in the Code, and one year before it was ever put in any shape on the statute books of North Carolina? Upon the same false principle of construction (a principle that can find no support in any book ever written on the subject), if section 1996 should be re-enacted in the Code of 1900, it would have no application to any road that might be built during the next century, but would apply to roads incomplete in the year 1868, thirty-two years before its enactment! But this very principle has been passed on by the Supreme Court of the United States in *James vs. Milwaukee*, 16 Wall., 159. In that case

a statute authorized a city to lend its credit to any railroad company incorporated and organized; and this court held that companies thereafter organized were intended to be included, and the statute was applicable to them, as well as those then in existence. This court said (p. 160, 161):

"The defendant in error insists that the power conferred was confined to companies already in existence at the date of the act, and such was the opinion of the court below. We entertain a different opinion."

In that case, there was no word denoting the future tense, no "shall," as in section 1996, but the only words used were the adjectives, "incorporated and organized."

The cases relied on by the county's solicitors, concerning the power to tax, being conferred by special act, in answer to the contention on the part of complainants, that the commissioners had the power to issue the bonds under the sections of the Code, set out above, can have no application to a case of the kind at bar. The Supreme Court has said, in a late case, *City of Charlotte vs. E. D. Shepard & Co.*, 122 N. C., page 603, that "where such a corporation," speaking of a municipal corporation, "has thus acquired the right to create a debt, and issue the bonds, *this power carries with it*, the power to levy the taxes necessary to pay said bonds, and the accruing interest thereon" (*Ralls vs. County Court*, 105 U. S., 733; *U. S. vs. New Orleans*, 98 U. S., 381).

These sections of the Code, 1996 and 1997, are as much the law of North Carolina as any other sections of the Code are; they are as much the law as the Constitution itself is. In the *Stanly County case*, the

Circuit Court of Appeals, in 1899, held itself bound by the decision of the Supreme Court of North Carolina (*Commissioners vs. Snuggs*, 121 N. C., 401).

In the *Snuggs case* the Supreme Court upheld the sections of the Code referred to, deciding, however, that they did not apply, the road not being an unfinished road, and the citizens of the County not having an interest in the same.

Estoppel of the County by the recitals in the bonds.

In that case there was no pretense that any bondholder was a party, it being, as we contend, an *ex parte* proceeding. If any bondholder had been a party, the decision would have been different, because, in the body of the bonds issued by *Stanly County*, there was a recital that they were issued in pursuance of Sections 1996, &c., of the Code. This shows the corporate authorities acted with these provisions of the Code before them, and that they passed upon all questions left for their determination, as said by Justice BREWER in his opinion in *The Mercer County Case*, on page 601 of the volume 170 U. S. R. It shows these corporate authorities were acting in good faith, and wanted to perform their duty according to law.

On page 307, Vol. 87 Federal Reporter, in the case of *Township of Ninety-six vs. Folsom*, the Circuit Court of Appeals, speaking through Judge JACKSON, says:

"It will be observed, from the inspection of these bonds, that their recitals show upon the face of the bond a compliance with the law under which they were issued. The purchaser had a right to assume that all

the conditions of the law were complied with, authorizing the issue of the bonds. The question whether they were issued in compliance with the law was a question that properly belonged to the authorities, who were authorized by the acts of the legislature to issue the bonds."

Purchasing these bonds, with the recitals they contained, was it required of the purchasers to find out whether the citizens of the county of Stanly had an interest in the railroad? Was it required of them to find out whether the railroad was completed or uncompleted? These were matters for the *corporate authorities*, and for them alone. Says Justice BREWER, in *Provident Trust Company vs. Mercer County*, 170 U. S. R., page 601:

"By a long series of decisions such recitals are held conclusive, in favor of a *bona fide* holder of bonds, that precedent conditions, prescribed by statute and subject to the determination of those county officers, have been fully complied with."

See, also, the recent important case of *Gunnison County Commissioners vs. Rollins*, 173 U. S., 255, as to the effect of recitals in bonds.

As we say, the decision would have been different if a bondholder had been a party, unless the Court had overruled the leading case of *Belo vs. Commissioners*, in which the rule as to the effect of the recitals in the bonds was laid down as stated by Justice BREWER in the *Mercer County case.*

The Supreme Court of North Carolina, in *Belo vs. Commissioners*, the leading case in that State upon the subject of municipal bonds, and the *effect of recitals in the bonds*, lays down the law as follows:

"While the decisions are very uniform that the record of the justices' court affirming the fact of compliance with the conditions precedent to the subscrip-

tion of stock is conclusive, and estops the county from denying the validity of the bonds in the hands of a *bona fide* holder before maturity, they are equally uniform in giving the same effect to the *recitals* in the bonds themselves, that they had been issued in pursuance of the law which authorized their issue. The recital is a determination of the question, and the holder has the right to rely on it (*Town of Coloma vs. Evans*, 92 U. S., Rep., 484; *Lynch vs. Winnebago*, 16 Wall., 13; *Knox county vs. Aspinwall*, 21 Howard, 539). In delivering the opinion of the Court in *Coloma vs. Evans*, Mr. Justice STRONG says: 'In the leading case of *Knox Co. vs. Aspinwall* the decision was rested upon two grounds. One of them was that the mere issue of the bonds containing a recital that they were issued in pursuance of the Legislative act was a sufficient basis for the assumption by the purchaser that the conditions on which the county was authorized to issue them had been complied with, and it was said the purchaser was not bound to look further for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to the *Royal British Bank vs. Turquand*, 6 Ellis and Blackburn, 327, a case in the Exchequer Chamber, which fully sustains it.'"

The foregoing are the words of Justice BYNUM in a decision which has never been departed from. Here the Supreme Court, in 1877, approved of the doctrine in the *Royal British Bank case* upon which *Knox vs. Aspinwall* was based.

When the Commissioners of the county of Wilkes acted under the power conferred in these two sections they construed them to mean what *they appeared to mean*. They had never been construed in North Carolina, and had been kept on the statute books of the State for nearly thirty years. The commissioners assumed that they were the judges of some of the matters named in these sections of the Code. They knew the road was an unfinished road, and while the recitals in the bonds did not embrace these sections of

the Code, as they did in the Stanly case, yet the board passed on the conditions, and assumed to act under the power here granted, as well as under the ordinance and the statutes before referred to in this brief.

All this shows the board acted with these provisions of the Code before them, and passed upon all questions left for their determination, as said by Justice BREWER in his opinion in the *Mercer County Case*, on page 601 of the volume 170 U. S. R. It shows these corporate authorities were acting in good faith, and wanted to perform their duty according to law.

Relevant and controlling decision of the United States Supreme Court in favor complainants' contention.

In further argument of the questions and propositions certified in the record, and in support of complainants' contentions, we call attention specially to the case of *Township of Pine Grove vs. Talcott*, 19 Wall., 666, 677. That case was an action in the United States Circuit Court upon coupons cut from bond issued by that township in aid of a railroad, under an Act of the General Assembly of Michigan. The plaintiff in error insisted that several decisions of the Supreme Court of that State holding that the construction of railroads was not a public corporate purpose such as townships were authorized by the Constitution of Michigan to aid, and that such statute and the bonds issued in pursuance of it were void, were controlling.

The Supreme Court of the United States, in declining to be bound by those decisions, said:

"It is insisted that the invalidity of the statute has been determined by two judgments of the Supreme Court of Michigan, and that we are bound to follow those adjudications. We have examined those cases with care. With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. We think the dissenting opinion in the one first decided is unanswered. Similar laws have been passed in twenty-one States. In all of them but two it is believed their validity has been sustained by the highest local courts. It is not easy to resist the force of such a current of reason and authority. The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself. Here, commercial securities are involved. When the bonds were issued there had been no authoritative intimation from any quarter that such statutes were invalid. The Legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration. And during the period covered by their enactment, neither of the other departments of the government of the State lifted its voice against them. The acquiescence was universal. The general understanding of the legal profession throughout the country is believed to have been that they were valid. The National Constitution forbids the States to pass laws impairing the obligation of contracts. In cases properly brought before us, that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective States, we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the constitution in providing for the creation of an independent federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery."

And it was there decided, in the face of the Michigan cases, that aiding the construction of a railroad

was a corporate purpose of a township, and the bonds sustained.

The federal courts are courts of independent jurisdiction, and have always held that in questions of general law they will exercise their own judgment and try and determine cases according to their own views of the rights of the parties.

Among the questions held to be of this character, and in the decision of which they have repeatedly refused to follow and be controlled by State decisions in similar cases, the litigation in some instances growing out of statutory enactments of the State, *are all questions of commercial law, and those involving the validity of corporate securities, taxation, unrestricted legislative powers, corporate purposes and public uses,* questions of public policy, contracts of carriers, contracts of insurance companies, the respective duties of master and servant, and others of general application. We cite some of the cases in which this doctrine has been asserted:

Oates vs. National Bank, 100 U. S,, p. 246.
Swift vs. Tyson, 16 Peters, pp. 1–18.
Butz vs. City Muscatine, 8 Wall, p. 584.
Venice vs. Murdock, 92 U. S., p. 501.
Alcott vs. Supervisors, 83 U. S., p. 689.
Railroad Co. vs. Lockwood, 84 U. S., p. 368.
Burgess vs. Seligman, 107 U. S., p. 33.
Myrick vs. R. R. Co., 107 U. S., p. 109.
Pana vs. Bowler, 107 U. S., p. 541.
Railroad Co. vs. Baugh, 149 U. S., p. 372.
Pine Grove Township vs. Talcott, 86 U. S., p. 687.

The Federal Courts will not follow the decisions of State Courts construing their own constitutions and statutes, made after the rights sought to be enforced,

accrued and vested, when they are in conflict with the construction placed upon the same in the State before and at the time of the vesting of the rights.

This exception to the general rule of conformity is according to the law as it was construed to be, when the bonds were put on the market as commercial paper:

Again it is said by this Court :

" The same principle applies, where there is a change of judicial decision as to the constitutional power of the Legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."

Gelpcke vs. City of Dubuque, 1 Wall. p. 206.

These cases upon this subject are reviewed at great length and the doctrine reiterated, approved and enforced in a still later case to which we refer the court.

Taylor vs. Ypsilanti, 105 U. S., pp. 69–70.

The exception is not confined to *judicial* constructions, but applies to all cases of previous and contemporaneous construction, whether made by the people, the bar, or the several departments of the State government, so it becomes *general and is considered* settled law. In the case of *Olcott vs. Supervisors* (83 U. S., p. 690), it is said :

" This court has always ruled that if a contract when made was valid under the constitution and laws of the State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the Legislature or the judiciary will be regarded by this court as establishing its invalidity. Such a rule is based upon the highest

principles of justice. Parties have a right to contract and they do contract in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule. If, then, the doctrine asserted in *Whiting vs. Fon du Lac Co.*, is inconsistent with what was the recognized law of the State when the county orders were issued, we are under no obligation to accept it and apply it to this case. The orders were issued in February, 1869, and it was not until 1870 that the Supreme Court of the State decided that the uses for which testator was authorized by the statute of April 10th, 1867, were not public uses and therefore that the statute was invalid." The later decision was not followed.

In the case of *Pine Grove Township vs. Talcott* (86 U. S., pp. 677–78), above cited and quoted from, it appeared that the statute in question was enacted in 1869, the bonds issued the same year, and the adverse decision of the State Court made in 1870. There had been thirty similar statutes between 1863 and 1869, *but no judicial construction had been had of any of them.* The court refused to follow the subsequent State decisions and sustained the bonds, making use of the language quoted, *supra.*

And in a large number of other cases the opinions of attorneys-general, secretaries of State, and the various officers of the States and counties whose duty it was to pass upon, and administer the statutes in question, were held strongly persuasive of what the law was, and not to be departed from except in very extreme cases.

Comanche Co. vs. Lewis, p. 198.
Havemeyer vs. Iowa Co., 3 Wall., p. 303.
U. S. vs. Moore, 95 U. S., 763.
U. S. vs. Pugh, 99 U. S., 269.
Pease vs. Peck, 18 How., 596.

This *character of construction is as binding upon the courts as constructions by judicial decisions.* Judge COOLEY, in his work on Con. Lim., p. 82 (6th Ed.), says:

"Where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention. And where this has been given by officers in the discharge of their official duty, and rights have accrued in reliance upon it which would be divested by a decision that the construction was erroneous, the argument *ab inconvenienti* is sometimes allowed to have very great weight."

To establish judicial construction within the meaning of the rule under discussion, *cases deciding the very point at issue are not required.* In *Taylor vs. Ypsilanti* (105 U. S., p. 65), decisions holding that the manufacture of *salt was a public purpose*, and a bounty paid to encourage the same was constitutional, were held sufficient to settle the law of the State as to the character of statutes authorizing the city of Ypsilanti *to aid in the construction of a railroad.*

In an Illinois case, by way of illustration of what was a corporate purpose, the court said in its opinion that the establishment of a reform school would be one. Afterwards, this illustration was cited as declaring that a reform school was a corporate purpose of a county in Illinois, and followed and accepted as *evidence* of what the law of the State was at the time the

bonds then in question were issued, *in preference to later cases.*

Livingston Co. vs. Darlington, 101 U. S., p. 412.

In *Douglass vs. Pike County* (101 U. S., p. 680), (above cited, *ante*, p. 30), the earlier cases were followed in preference to later ones overruling them, *although the question upon which the bonds were held void was not raised or discussed in the first decisions, because the bonds were issued and sold under the declaration that the law of the State was as in those decisions stated, and the rights then acquired.*

It thus clearly appears that, at the time these bonds were issued and sold, the clause of the Constitution and statutes under consideration had received well-settled constructions favorable to the validity of the statutes, placed upon them by the Legislature in the enactment of numerous similar statutes, by the people in their long acquiescence, in legislation affecting nearly the whole State, by the favorable opinion of the bar, and impliedly, at least, by the decisions of the highest Court of the State.

This court will not now depart from this proper construction, and follow a late decision giving a different one to the statute, which defeats vested rights.

It is only well-settled and consistent decisions of the State Courts that the Federal Courts will follow; and to be authoritative and controlling in any case, the construction placed upon the State constitution or statute by the courts of the State must be settled and fixed so as to be incorporated itself with the statute and become one of property.

We cite some of the cases in which this doctrine has been announced.

Burgess vs. Seligman, 107 U. S., p. 33.
Thompson vs. Perrine, 103 U. S., p. 817.
Pana vs. Bowler, 107 U. S., p. 540.
Butz vs. Muscatine, 8 Wall., p. 583.
Pease vs. Peck, 18 Howard, p. 598.

In the case last cited it is said:

"There are, it is true, many *dicta* to be found in our decisions averring that the Courts of the United States are bound to follow the decisions of the State Courts on the construction of their own laws. But, although this may be a correct, yet a rather strong expression of a general rule, it cannot be received as the enunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions to it. In all cases where there is a settled construction of the laws of a State by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to reseive and adopt it. * * * When the decisions of the State Court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions—and much more is this the case where, after a long course of consistent decisions, *some new light suddenly springs up, or an excited public opinion has elicited new doctrines subversive of former safe precedent.*"

Stanly County Bond Case.

In view of the fact that the United States Circuit Court of Appeals for the Fourth Circuit is now holding under advisement a petition for rehearing in the case of certain *Stanly County*, North Carolina, bonds, already referred to, until the questions certified in this case are answered by this Court, we ask the Court's consideration of the argument contained in the petition of Coler & Co., also complainants in that case.

In this connection we call the attention of the Court to the order advancing this case for argument upon motion and petition of appellants. The order allows counsel for *Commissioners of Stanly County* and for *Town of Oxford* in the cases in the Circuit Court of Appeals, on petition for rehearing in that Court, to file briefs in support of their contention in these cases, the same to be considered in connection with the case at bar, for reasons set out in this petition.

We also call attention to the petition filed by appellants in the case at bar, and to that part of the same in which they allege it is desirable that the merits in the case be passed on by this Court.

The petition is as follows:

TO THE HONORABLE THE JUDGES OF THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT:

The petition of W. N. Coler and Company, complainants in the above-entitled suit, prays this honorable court to rehear the above-entitled appeal, and to reconsider the decree and opinion therein rendered, and respectfully shows to this honorable court the reasons and grounds therefor as follows:

The petitioners understand from the reading of the opinion of his honor, Judge GOFF, filed on the 11th of August, 1899, that the Circuit Court of Appeals felt bound by the decisions of the Supreme Court of North Carolina rendered after the issue and sale of the bonds to complainants, who purchased them for value and without notice in good faith, and relying upon their being valid bonds of the county of Stanly, as set out in the bill. The cases to which the honorable court refer in the opinion filed are *Union Bank of Richmond vs. Commissioners of Town of Oxford*, 119 N. C., 214; 25 S. E., 966; *Board vs. Snuggs*, 121 N. C., 394; 28 S. E., 539; *City of Charlotte vs. Shepard* 120 N. C. 411; 27 S. E. 109; *Rodman vs. Town of Washington*, 122 N. C., 39; 30 S. E., 118; *Board vs. Call* (N. C.), 31 S.E., 481, in which case it was also held that sections 1996-2000 of the Code of North Carolina "authorizing county commissioners to subscribe stock

to a railroad company when necessary to aid in the completion of a railroad do not include a railroad not commenced before the Constitution of 1868 was adopted."

As your petitioners before averred, these cases were decided long after the sale of the bonds and purchase of the same in the year 1889. Your petitioners further aver that it appears from the reading of the opinion of this honorable court that its decision in the respect suggested is based upon the case of *Leeper vs. Texas*, 139 U. S., 462, 467, and upon the case of *Post vs. Supervisors*, 105 U. S., 667.

In the Leeper case there was a writ of error to a State Court, and in the Post-Supervisors case the writ of error was to the Circuit Court of the United States. The principles governing these two cases, as your petitioners aver, are laid down clearly by Justice GRAY in the case of *Central Land Company vs. Laidley*, 159 U. S. R., page 103, and by Justice PECKHAM, in *Turner vs. Wilkes County Commissioners*, 173 U. S., page 461.

In the Laidley case, on page 111, Justice GRAY says:

"The decisions cited by the plaintiff in error to support the jurisdiction of this court in the case at bar were either cases in which the writ of error was upon a judgment of a State Court which gave effect to a statute alleged to impair the obligation of a contract made before any such statute existed, as in *Louisiana vs. Pillsbury*, 105 U. S., 273; in *Chicago Ins. Co. vs. Needles*, 113 U. S., 574; and in *Mobile & Ohio Railroad vs. Tennessee*, 153 U. S., 486, or else the writ of error was to a Circuit Court of the United States bringing to this court the whole case, including the question how far the courts of the United States should follow the decisions of the highest court of the State, as in *Gelpecke vs. Dubuque*, 1 Wallace, 175, 205; *Olcott vs. Supervisors*, 16 Wall., 678, 690; *Douglass vs. Pike County*, 101 U. S., 677, 686; *Anderson vs. Santa Anna*, 116 U. S., 356, 361, and other cases cited in *Louisiana vs. Pillsbury*, 105 U. S., 278, 295."

Your petitioners aver that the case at bar is an appeal to the Circuit Court of Appeals from a decree of a Circuit Court of the United States, "*bringing to this court the whole case, including the question how far the Courts of the United States should follow the decisions of the highest court of the State.*"

Your petitioners further aver that in the last number of the U. S. Reports, vol. 174, page 499, in the case of *Wade vs. Travis County*, this principle is discussed by Justice BROWN.

That Justice says, in the outset, the case involves "the weight to be given to alleged conflicting decisions of the Supreme Court of Texas as to the validity of the bonds."

The case was begun in the Circuit Court of the United States, and the judgment of the court was affirmed by the Circuit Court of Appeals. Upon plaintiff's petition for *certiorari* the writ was allowed, and the Supreme Court reversed the decisions of these courts, which were against the validity of the bonds, as being issued in violation of the Constitution of Texas, and adjudged that they were valid and legal bonds. On page 508 the Justice says:

"In determining what the laws of the several States are which will be regarded as rules of decision, we are bound to look not only at their constitutions and statutes, but at the decisions of their highest courts giving construction to them." *Post vs. Supervisors* is one of the cases cited in support of this rule by the court.

"If there be any inconsistency in the opinions of these courts, the general rule is," adds the Justice, "that we follow the latest settled adjudications in preference to the earlier ones."

After laying down the general rule, as above, Justice BROWN says:

"One exception has been admitted to this rule, where, upon the faith of State decisions affirming the validity of contracts made, or bonds issued, under a certain statute, other contracts have been made or bonds issued, under the same statute, before the prior cases were overruled. Such contracts and bonds have been held to be valid upon the principle that the holders, upon purchasing such bonds, and the parties to such contracts, were entitled to rely upon the prior decisions as settling the law of the State. To have held otherwise would enable the State to set a trap for its creditors by inducing them to subscribe to bonds, and then withdrawing their security *(Gelpecke vs. Dubuque*, 1 Wall., 175*)*. Other cases are cited for this exception, including *Burgess vs. Seligman*, 107 U. S., 20."

Your petitioners further aver that what the state of the decisions is, in a court of highest jurisdiction, upon

a given subject, is a question of fact, to be passed on by the court in the first instance. And if, upon an examination of the cases, they *appear* to support a principle, the court will adjudge that there exists a certain course of decision for that period. If there are decisions which *appear* to support the principle upon which complainants, your petitioners, base their contention that the bonds in question are valid securities, it is to those decisions only that the court will look.

Your petitioners respectfully aver that his honor Judge GOFF, in his opinion in this case, uses the following words:

"The contention of the appellees that there were prior adjudications of the Supreme Court of North Carolina inconsistent with the decisions of that court in the cases of *Union Bank of Richmond vs. Commissioners of the Town of Oxford* and *Board of Commissioners of Stanly County et al. vs. Snuggs, supra*, which had become rules of property, and which were overruled by these decisions, is not sustained by an analytical examination of the cases referred to, and, in our opinion, that court has not, in any of the cases called to our attention, enunciated a doctrine really in conflict with its decisions in the two cases we have last mentioned. It is true that, in some instances, the language used by the court is misleading in its tendencies, and even susceptible of the construction so placed upon it, but a careful consideration of the cases and the facts to which they relate forces the conclusion that the court had no intention of including within the purview of its judgment bills of the character of those embraced by the provisions of Art. 2, section 14 of the Constitution of the State of North Carolina."

In the light of the above, your petitioners further aver that if the decisions relied on by complainants "*are susceptible of the said construction so placed upon*" them, this court, in favor of an innocent bondholder, relying upon that construction, and acting in good faith in the purchase of the bonds, will so construe the decisions as to uphold the securities.

The above comes directly within the rule laid down by Justice GRAY in *Louisville, &c., Ry. Co. vs. Louisville Trust Company*, 174 U. S. R., on pages 573 and 574. Justice GRAY says:

"In *Merchants' Bank vs. State Bank*, 10 Wall., 604, this court stated, as an axiomatic principle in the law

of corporations, this proposition: 'Where a party deals with a corporation in good faith the transaction is not *ultra vires* and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity, in fact, exists. If the contract can be valid, under any circumstances, an innocent party, in such case, has a right to presume their existence and the corporation is estopped to deny them' (10 Wall., 644, 645). The proposition was supported by citations of many English and American cases, and among them *Royal British Bank vs. Turquand* [1856], 6 El. & Bl., 327. And the justices of this court, while differing among themselves in the application of the principle to municipal bonds, have always treated *Royal British Bank vs. Turquand*, as well decided upon its facts (*Knox County vs. Aspinwall*, 21 Howard, 539, 545; *Mofan vs. Miami County*, 2 Black, 722, 724; *Gelpecke vs. Dubuque*, 1 Wall., 175, 203; *St. Joseph vs. Rodgers*, 11 Wall., 644, 666; *Humboldt vs. Long*, 92 U. S., 642, 650. And see *Zabriskie vs. Cleveland, Columbus and Cincinnati Railroad*, 23 Howard, 381, above cited)."

The cases cited by Justice GRAY, in the above paragraph, are decided upon municipal bonds and show that the principle he states applies to contracts with municipal as well as to other corporations; and the late Justice MILLER, in his dissenting opinion in the case of *Humboldt Township vs. Long*, 92 U. S. R., pp. 650 and 651, says the case of *Knox County vs. Aspinwall*, 21 Howard, 539, the original case on which the rule and principle are based, *is itself based upon The Royal British Bank vs. Turquand.*

Your petitioner respectfully avers that this court will adopt the view of this question, contended for by them, and, as said by Justice GRAY, if, "*under any circumstances,*" the bonds can be upheld and declared valid, this court will so adjudge.

Your petitioners further aver that, from their understanding of the opinion of the court in this case, it is based upon the view of the court that it is bound by the decision of the Supreme Court in the case *Board of Commissioners vs. Snuggs*, 121 N. C., 394, in its construction of sections 1996, 1997, 2000, which sections are among the recitals in the bonds in question. It

should be remembered that, in the above case, *no bondholder was a party*, and the decision is put upon the distinct ground that the sections of the code relied on do not apply, and do not confer the power upon the corporate authorities to issue such bonds *for the sole reason that it is not shown* the citizens of the county had an interest in the bonds and that the road was an unfinished railroad.

And, your petitioners aver, this court is not bound by this construction of these sections of the Code for the reasons set out in the foregoing paragraph of this petition. If a construction *can be placed* upon these sections, so as to uphold the bonds, this court will adopt that construction.

The Supreme Court of North Carolina, in *Belo vs. Commissioners*, 76 N. C. R., 489, the leading case upon the subject of municipal bonds and the *effect of recitals in the bonds*, lays down the law as follows:

"While the decisions are very uniform that the record of the justice's court, affirming the fact of compliance with the conditions precedent to the subscription of stock is conclusive and estops the county from denying the validity of the bonds in the hands of a *bona fide* holder before maturity, they are equally uniform in giving the same effect to the recitals in the bonds themselves, that they had been issued in pursuance of the law which authorized their issue. The recital is a determination of the question, and the holder has a right to rely on it (*Town of Coloma vs. Evans*, 92 U. S., 484; *Knox County vs. Aspinwall*, 21 Howard, 539). Mr. Justice GRAY says: 'In the leading case of *Knox Co. vs. Aspinwall* the decision was rested upon two grounds. One of them was that the mere issue of the bonds containing a recital that they were issued in pursuance of the Legislative act was a sufficient basis for the assumption by the purchaser that the conditions on which the county was authorized to issue them had been complied with, and it was said the purchaser was not bound to look further for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to the *Royal British Bank vs. Turquand*, 6 Ellis and Blackburn, in a case in the Exchequer Chamber, which fully sustains it.'"

The foregoing, as your petitioners aver, are the words of Justice BYNUM in a decision which has *never been departed from*. Here the Supreme Court, in 1877,

approved of the doctrine in the *Royal British Bank case*, upon which *Knox vs. Aspinwall* was based.

If a bondholder had been a party to the case of *Board vs. Snuggs*, it is not to be supposed that the court would have decided the case as it did. They could not without overruling *Belo vs. Commissioners*. Whether the citizens had an interest in the railroad, and whether the railroad was finished, were matters to be passed on by somebody. There was no one else to pass upon them but the board of commissioners, named in the sections. As your petitioners aver, these were conditions, and it was not for the bondholder to come and ascertain whether they were complied with or not. All he had to do was to look to the recitals in the bonds.

For the reasons above set forth, the appellees respectfully submit to this honorable court their petition for a rehearing of the appeal in the case of *Board of Commissioners of Stanly county et al. vs. Coler & Co.*, and ask leave to reargue the same.

For the foregoing reasons we submit that the first and third questions certified should be answered "No," and the second question "Yes."

CHARLES PRICE,
Solicitor for Complainants.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 167.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.

vs.

W. N. COLER & COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF W. N. COLER & COMPANY.

Statement of the Case.

This case comes before this Court on a certificate made by the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, propounding to this Court certain questions for instruction to guide the said Judges in their disposition of this case.

The questions are set forth in the record, pages 42 and 43.

This suit was brought by W. N. Coler & Co., in the United States Circuit Court for the Western District of North Carolina, on certain bonds issued by the county of Wilkes, in the State of North Carolina, a copy of which bonds is set forth in the record (p. 24), and is made part of the complaint in this cause (Record, p. 6, paragraph 24). The defendants to the bill were the Board of Commissioners of Wilkes County and Clarence Call, ex-Sheriff and County treasurer, and John H. Johnson, the present Sheriff and County treasurer. The County and Call filed answers.

The form of these bonds is admitted by the answers (Record, p. 15, paragraph 24, and Record, p. 20, paragraph 1).

These bonds bear date October 1, 1889 (Record, p. 24), and were issued on or about said date (Record, p. 6, paragraph 24 of complaint).

This also is admitted by the answers (Record, p. 15, paragraph 24, and Record, p. 20, paragraph 1).

The complaint (Record, p. 6, paragraphs 25 and 25*a*) states that the said bonds were duly sold, and that the plaintiffs became the *bona fide* purchasers thereof. The answer of the defendant Board of Commissioners of the county denies any knowledge or information sufficient to form a belief in regard to this allegation (Record, p. 16, paragraph 25). The answer of the county sheriff admits the truth of the allegation (Record, p. 20, paragraph 2). The certificate made by the Judges of the Circuit Court of Appeals (Record, pp. 42 and 43) propounds certain questions to this Court on the hypothesis that the plaintiffs are the *bona fide* purchasers and holders of such bonds, and they must, therefore, be deemed such in the consideration of the questions certified.

The complaint (Record, p. 2, paragraph 4) alleges that the interest was regularly paid on these bonds for about eight years (admitted by answer, Record, p. 9, paragraph 4). The complaint also alleges (Record, p. 2, paragraph 6), that certain taxes had been levied for subsequent years and collected, and that these sums of money were in the hands of the sheriff, who was *ex officio* the treasurer of the defendant county of Wilkes. This was admitted by answer of the Sheriff (Record, p. 20, paragraph 1). The complaint also alleged that there was a contest among the respondents for the possession of said sums of money, and that the respondents, unless restrained, will dispose of these sums of money (Record, p. 7, paragraph 26). The complaint (Record, p. 7) prays for an accounting of these moneys by the defendant treasurer of the county, that a receiver be appointed, and for an injunction, and for such other, further and general relief as the premises may warrant and the rules of equity allow.

The defendant the Board of Commissioners of the county of Wilkes filed an answer (Record, p. 8), and the defendant Clarence Call, the sheriff and *ex officio* treasurer of the county, also filed an answer (Record, p. 20). These answers substantially admitted the allegations of the complaint with regard to the issue of the bonds, the payment of interest, the actual construction of the railroad to aid which the bonds were issued, etc., etc., but set up as defenses that the bonds were issued without authority of law. These defenses will be considered later on in this brief so far as they are pertinent to the questions certified to this Court.

The Circuit Court rendered a decree (Record, p. 41), reciting that the cause came on to be heard upon the

bill, answers, replications and former orders, exhibits and other evidence in the cause, and adjudging that the sheriff and ex-sheriff, *ex officio* treasurers of the county, are the lawful trustees of the bondholders, and hold the sum of $13,000 mentioned in the bill [being taxes collected for the payment of interest on these bonds] as such trustees, for the benefit of said bondholders, and for the purpose of paying off and discharging the interest due on said bonds, as set out in the bill. The Court appointed a receiver, and directed that the said $13,000 be paid to such receiver and held by him until the further order of the Court.

An appeal was taken by the defendants from this decree to the United States Circuit Court of Appeals for the Fourth Circuit (Certificate of Judges, Record, p. 42). The Judges of the said Court, after hearing arguments upon the said case, made their certificate certifying certain questions or propositions of law to this Court for their instruction and guidance in disposing of the case (Record, p. 42).

ARGUMENT.

The certificate certifying the questions to this Court was made in substantially the same form as the certificate made by the same Circuit Court of Appeals in the case of *Folsom vs. Ninety-Six*, 159 U. S., 611, 614.

THE FIRST QUESTION CERTIFIED.

The first question certified is as follows (Record, p. 42):

"Whether, upon the averments of the bill of complaint, answers, replications, orders, exhibits and other

evidence, and matters and things recited herein, the circuit court of the United States was bound in passing upon this case by the decisions of the supreme court of North Carolina in the following cases :

Commissioners of Wilkes County vs. Clarence Call *et al.*, 123 North Carolina Report, 308 ;

Bank vs. Commissioners, 119 N. C. Rep., 214 ;

Commissioners vs. Snuggs, 121 N. C. Rep., 394 ;

Radman vs. Washington, 122 N. C. Rep., 39 ;

Commissioners vs. Payne, 123 N. C. Rep., 432 ;

considered in connection with prior decisions of said court and the following provisions of the constitution of said State :

Article 2, sections 14 and 16, and article 5, sections 1, 4, 6 and 7, and article 7, section 7."

The above-mentioned case of *Commissioners of Wilkes County vs. Clarence Call et al.*, 123 N. C., 308 (1898), was a suit in equity brought in the State Court on or about the 23d day of December, 1897, by the commissioners of the county of Wilkes against Clarence Call, as treasurer of the County of Wilkes, to enjoin him from paying any further interest upon the bonds which are now involved in this case. This is the suit referred to in the complaint in this cause (Record, p. 3 of complaint, paragraph 7 *et seq.*). The plaintiffs in this cause were not parties to the said suit, and the decree in the said suit of course does not bind them. The only parties to the said suit, as stated above, were the county commissioners, as plaintiffs, against the county treasurer as defendant—both plaintiffs and defendant really representing the county. It is to be added, however, that J. M. Turner and J. M. Wellborn,

alleging that they were the owners of one of the bonds of the county of Wilkes, were allowed (after appeal to the Supreme Court of North Carolina) to make themselves parties to the said suit, as fully stated and set forth in the complaint in this cause (Record, p. 4, paragraph 12 *et seq.*). It is alleged in the complaint that the said Turner and Wellborn were not owners of the said bond, but obtained the same for the purpose of becoming parties to the said proceeding, that they might aid the plaintiffs in their effort to effect a repudiation of the said county bonds (Record, p. 16 of complaint). It is also alleged that the county commissioners paid $24.30 costs, which were decreed against the said Turner and Wellborn (Record, p. 5, paragraph 16), thus showing that the said Turner and Wellborn were acting with the county commissioners. It is expressly stated in the report of the said case of *Commissioners vs. Call*, 123 N. C., 308, that no counsel appeared in that court in opposition to the county commissioners—that is, no counsel appeared in that court on behalf of Turner and Wellborn, nor on behalf of the defendant Clarence Call—so that the arguments and proceedings in the Supreme Court of the State were really *ex parte*, only the county commissioners being represented there.

On this point the Supreme Court of North Carolina, in its opinion in *Commissioners of Wilkes County vs. Clarence Call, Sheriff and ex-officio Treasurer of Wilkes County et al.*, 123 N. C., 308, says:

"It has been suggested" (p. 327) "that the defense in this case has been only colorable, as but one of the bonds was represented. Under the circumstances, we think that was sufficient. An elaborate *answer*, evidently prepared by able counsel, has been filed presenting every reasonable defense; and, while *no argument was made before us for the defendants*, every phase

of the case has been carefully examined by us in the five months during which we have held it under advisement."

On this point Mr. Justice FURCHES, in the dissenting opinion, says (p. 332) :

" It has not escaped my attention that there is in the printed record an agreement as to what Acts are to be considered by the Court in deciding this case, and the Act of 1868 is not one of those named. This agreement is signed by the counsel for plaintiffs [Commissioners of Wilkes County], and by counsel for Mr. Turner and Mr. Welborn, but it is not signed by anyone for the defendant Call. But, if it had been signed by Call, I would have to disregard it."

Again, on page 336 :

" The court in its opinion says that certain positions were strenuously insisted on by the defendant. I think this must be a mistake, as *the case was not argued before us, either by brief or by oral argument, on behalf of the defendants.* Mr. Turner and Mr. Welborn by leave of the court made themselves parties defendant after the action was brought, but *they have given the case no further attention.* Why they did this I do not know. The case appears to be a controversy so far as parties are concerned, for there are plaintiffs and there are defendants. But as to the conduct of the case before this Court is concerned, it has been unilateral."

This decision, made more than eight years after the bonds in suit were issued and sold and which was *ex parte*, and in which the bondholders were not heard and in which the plaintiffs in the present cause were not parties—this decision is one of those which the County now insists is absolutely binding upon the Federal Courts in the decision of the present cause.

The first question certified to this court is " Whether, upon the averments of the bill of complaint, answers," etc., accompanying the certificate in this case, the United States Circuit Court of Appeals was bound in

passing upon this case by the decision of the Supreme Court of North Carolina in the said case of *Commissioners vs. Call*, 123 N. C., 308, and other cases. Of course the plaintiffs, not being parties to that cause, were not bound by the decree as an estoppel, or as making the matter of the litigation *res adjudicata*.

The question propounded to this Court, however, is, as we understand it, Whether the United States Circuit Court of Appeals, as a United States court, in passing upon the validity of these bonds in this case, is bound by the decision of the State Supreme Court in *Commissioners vs. Call*, 123 N. C., and by the decisions of the State Supreme Court in the other cases above cited, in forming its opinion and rendering judgment in this case. All of the cases cited were decided by the Supreme Court of the State of North Carolina long after the bonds in question in the present case had been issued. The principle is well established in numerous cases in this Court that:

"When contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued" (Opinion of Mr. Justice BRADLEY, *Burgess vs. Seligman*, 107 U. S., 20, 33, 34, quoted by Mr. Justice GRAY, in the case of *Folsom vs. Ninety-six*, 159 U. S., 611, 625).

The case of *Folsom vs. Ninety-six* was a case arising in South Carolina, where the Supreme Court of the State, after certain railroad aid bonds were issued, rendered decisions holding them invalid, and the Supreme Court of the United States expressly held, in answer to questions certified by the United States Cir-

cuit Court of Appeals for the Fourth Circuit, that the federal courts were not bound by such subsequent decisions. In this case of *Folsom vs. Ninety-six* the question arose on the construction of the *constitution* of the State of South Carolina, and this Court held that the same rule applied as respects subsequent decisions of a state Supreme Court construing its state constitution as applied in subsequent decisions construing state statutes. In neither case are the federal courts bound by such decisions.

This case of *Folsom vs. Ninety-six* is a case exactly in point, and it requires that this Court make an answer in the negative to the first question certified by the Judges of the Circuit Court of Appeals in the present case, namely, to answer that that court is not bound in passing upon this case by the decisions of the courts of North Carolina rendered in the case of *Commissioners vs. Call*, and others above cited.

We have said, advisedly, that the case of *Folsom vs. Ninety-six*, 159 U. S., 611, is in point. We observe that the learned counsel on the other side (brief of Judge AVERY, page 42), says :

> " The plaintiffs' case is distinguished from *Folsom vs. Ninety-six*, in that in Folsom's case it was admitted that the Supreme Court of South Carolina, after the township bonds were issued, had overruled a former decision favorable to the validity of the bonds. In our case the Supreme Court of North Carolina have reiterated the statement in all of the cases cited in the certificate, that the Court had never at any time before the bonds were issued rendered any decision in conflict with *Bank vs. Commissioners*, 119 N. C., 214."

The learned counsel is mistaken in saying that it was admitted that the Supreme Court of South Carolina, after the township bonds were issued, had overruled a former decision favorable to the validity of the

bonds. Thus, in *Floyd vs. Perrin*, 30 S. C., page 1, the Court says, at page 20, as follows :

" It is said, however, that this court has, in at least two cases, impliedly, though not expressly, recognized the power of the general assembly to invest townships with the taxing power (*Chamblee vs. Tribble*, 23 S. C., 70, and *Railway Company vs. Tribble*, 25 *Id.*, 260). It is not, and cannot be, pretended that the question now presented was either raised, considered, or decided in either of these cases, but the claim is that the power now brought in question was, by implication, recognized."

Referring to this matter, the Supreme Court of the United States, through Mr. Justice GRAY, in *Folsom vs. Ninety-six*, at page 627, says :

" There *not being shown to have been a single decision of the state court against* the constitutionality of the act of 1885 before the plaintiff purchased his bonds, *nor any settled course of decision upon the subject*, even since his purchase, the question of the validity of these bonds must be determined by this court *according to its own view* of the law of South Carolina."

We repeat, therefore, that the learned counsel is mistaken in his attempt to differentiate *Folsom vs. Ninety-six* from the present case.

The Supreme Court of South Carolina, in its attempt to hold the bonds invalid in the case of *Floyd vs. Perrin*, pretended not to overrule any prior cases decided before the said bonds were issued, just as the Supreme Court of North Carolina in the *Oxford County case* and the other cases mentioned in the first question certified in this case has pretended not to overrule its prior decisions rendered before the bonds in question were issued. This Court determines for itself whether the later decisions overruled former decisions, and, if there were no former decisions adverse

to the validity of the bonds at the time they were issued, then this Court will take up and consider the matter on the state of the adjudications which did exist at the time; and, if there were no decisions in favor of the validity of the bonds, then this Court will consider the case *de novo*, and will, as stated by Mr. Justice GRAY in the said case of *Folsom vs. Ninety-six*, page 627, determine the case "*according to its own view.*"

The case of *Amoskeag Bank vs. Ottawa*, 105 U. S., 667, is cited by the learned counsel for Wilkes county, Judge AVERY, in his brief (p. 6), as an authority in support of the proposition that the United States courts are bound to follow a decision of the Supreme Court of the State rendered *after* bonds were issued. That case does not support any such doctrine. On the contrary, Mr. Justice GRAY states that case as follows (105 U. S., 667, 668):

"These actions are brought upon municipal bonds purporting to have been issued under an act of the General Assembly of Illinois of February 18, 1857. The facts of the cases do not substantially differ from those which appeared when one of the cases was before this court at October Term, 1876, and the principles then affirmed must control the present decision. (See *Town of South Ottawa vs. Perkins* and *Supervisors of Kendall County vs. Post*, 94 U. S., 260). Those principles may be summed up as follows:

First. By the law of the State of Illinois, as often declared by the Supreme Court of that State, **before** as well as after the execution of the bonds in suit, the provisions of the Constitution of 1848, requiring each house of the legislature to keep and publish a journal of its proceedings, and, on the final passage of all bills, to take the vote by ayes and noes, and ordaining that no bill shall become a law without the concurrence of a majority of all the members elect of each house, are not merely directory; but, if the journals, being produced or proved, fail to show that an act has been passed in the mode prescribed by the Constitution, the

presumption of its validity, arising from the signatures of the presiding officers and of the executive, is overthrown, and the act is void."

It will thus be seen that Mr. Justice GRAY states that the decisions in Illinois holding that resort might be had to the journals to overthrow an enrolled act were rendered *before* the bonds in question in that case had been issued. On looking at the report of those cases, 94 U. S., 260, we find that this Court says:

"As early as *1853* it was decided, in *Spangler vs. Jacoby*, 14 Ill., 297, that it was 'competent to show from the journals of either branch of the legislature that a particular act was not passed in the mode prescribed by the Constitution, and thus defeat its operation altogether.'"

The act under which the bonds in question in those cases were issued was not passed until February 18, 1857, *four years after this decision of the Illinois Court in Spangler vs. Jacoby*, 14 Ill., 297, rendered in 1853, and the bonds were issued years afterward.

The learned counsel, therefore, is clearly mistaken in stating that these cases of *Amoskeag Bank vs. Ottawa*, 105 U. S., 667, and similar cases, 94 U. S., 260, are like the present case.

The first question propounded is, Whether these cases, "considered in connection with prior decisions of said court" and certain provisions of the constitution of said state, were binding upon the United States Circuit Court of Appeals in passing upon this case. This form of the question certified renders it necessary to consider the "prior decisions" of the State Court. We proceed to consider these prior decisions in this brief so far as it seems to us necessary to enable the Court to dispose completely of the present case.

In order to arrive at an intelligent understanding of these prior decisions, it is necessary to state the Ordinance of March 9, 1868, adopted by the Constitutional Convention and the legislation applicable to this issue of bonds.

I.

The ordinance enacted by the Constitutional Convention of the State of North Carolina, March 9, 1868, entitled "An Ordinance to Incorporate the Northwestern North Carolina Railroad Company," gave, per se, clear and complete authority to the County of Wilkes to issue the bonds in question, and this proposition was twice expressly decided by the Supreme Court of North Carolina before the said bonds were issued.

The Constitutional Convention of the State of North Carolina enacted an ordinance to incorporate the Northwestern North Carolina Railroad Company, ratified March 9, 1868, printed in the record in this case, pages 24 to 27. This ordinance provided in section one :

" That, for the purpose of constructing a railroad of one or more tracks, from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of

two millions of dollars, which shall have a corporate existence as a body politic for the space of ninety-nine years," etc.

Section 2 of the said ordinance provided:

"Be it further ordained, That the capital stock of said company may be created by subscriptions on the part of individuals, corporations *and* COUNTIES, in shares of one hundred dollars."

Section 12 of the said ordinance provided:

"Be it further ordained, That the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all *counties* or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company."

"The act incorporating the North Carolina and Atlantic Railroad Company," referred to in the said section 12 of the said ordinance, is the act, chapter 156, of the laws of North Carolina, session of 1852, sections 33 to 37 of which are printed in the record, page 31, and said sections 33 to 37 are by such reference adopted and made party of said ordinance. These sections there quoted are the only material and pertinent sections of the said act of 1852, and are the only sections thereof which relate to county or municipal subscriptions.

Section 33 of the said act of 1852 provides:

"It shall be lawful for *any incorporated town or county, near or through which said railroad may pass*, to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabit-

ants of said town or the citizens of said county, in manner and form as hereinafter provided" (Record, p. 31).

The language of section 2 of the ordinance above quoted is general—that "the capital stock of said company may be created by subscriptions on the part of individuals, corporations and *counties.*" So also the language of section 12 of said ordinance is general —"*all* counties or towns subscribing stock." The said section 2 and the said section 12, if standing alone, would clearly include counties generally. The said section 33 of the act of 1852 provides that "it shall be lawful for *any incorporated town or county, near or through which said railroad may pass.*" If this operates in any way to restrict the otherwise general language of said sections 2 and 12 in the ordinance of 1868, it is, nevertheless, perfectly clear that the county of Wilkes is embraced within the language of said section 33. A glance at the map of the state of North Carolina shows that a railroad constructed "from some point on the North Carolina Railroad between the town of Greensboro, in Guildford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point on the northwestern boundary line of the state," must necessarily pass near or through Wilkes county.

The demonstration, therefore, is complete, that the said ordinance of the Constitutional Convention of 1868 expressly authorized the county of Wilkes to subscribe for stock in the said railroad company. It is also perfectly clear that the said county of Wilkes was authorized by the said ordinance of 1868, and by the said act of 1852, which was referred to in section

12 of said ordinance, to issue under the sanction of a popular vote, bonds of the county in payment of such subscription to said stock. Section 34 of the said act of 1852 provides that the justices of peace of the county may make an order for an election of the qualified voters of the county (Record, p. 31). Section 35 of said act of 1852 provides:

"That if, upon the return of such constable and of such sheriff, it shall appear that a majority of the qualified voters of such town, and by the return of the sheriff that a majority of the qualified voters of such county, voting upon the question, are in favor of the subscription, the corporate authorities of such town and the justices of such county shall appoint an agent to make the subscription in behalf of such town and county, to be *paid for in the bonds of such town and county*, and on such time as shall be agreed on by said town officers and the justices of such county" (Record, p. 32).

The language of section 12 of the said ordinance is "that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company." The method of making the subscription, the method of paying such subscription—namely, in the bonds of such county—and all the other things in the said act of 1852 relating to the method of making the said subscription and paying the said subscription are, by this reference, incorporated into, and are a part of, the said ordinance of 1868. *(See cases on this point in* MR. PRICE'S BRIEF, pp. 41-42.) The method of paying said subscription—namely, by the bonds of the county—is as much a part of the said ordinance as are the other provisions of the act of 1852 in regard to the

making of the said subscription. It was so held, prior to the issues of the bonds now in suit, by the Supreme Court of North Carolina in the two *Forsyth County cases* of *Hill* and *Belo* below quoted. No other method of paying the said subscription is provided for, either in the said ordinance or in the said act of 1852. Such a construction must be placed upon the ordinance and act as will render them effective and not nugatory.

The bonds in suit were duly authorized by a vote of the majority of the qualified voters of Wilkes County.

The said bonds now in controversy recite that they are

" authorized by a vote of a majority of the qualified voters of Wilkes county, by an election regularly held for that purpose on the sixth day of November, A. D. 1888, and by an order of the Board of Commissioners of Wilkes county [the said Board of Commissioners having conferred upon them, under the constitution of 1868 and the code of North Carolina, the same power which the justices of the peace formerly had] made on the first day of April, A. D. 1889. This series of bonds is issued to pay the subscription of $100,000 made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes" (Record, p. 24).

The complaint in the present case alleges (Record, p. 6, paragraph 22) :

" That the county of Wilkes, acting through its Board of Commissioners, and in accordance with the ordinance and acts as above set out, subscribed the sum of $100,000 to the capital stock of the Northwestern North Carolina Railroad Company, a proposition to subscribe the said amount having been submitted to the qualified voters of the county at an election held according to law, and a large majority of the said qualified voters having voted in favor of the same."

The answer of the county commissioners (Record, p. 15, paragraph 22) avers :

" These respondents, still denying the authority of the former commissioners to issue bonds or subscribe to the capital stock of the said company, admit that they did subscribe and issue bonds in the amounts alleged in the complaint, and that it was ascertained and declared that a majority of the qualified voters of Wilkes county had voted in favor of making such subscription, and that it is now too late to question said finding as to said vote."

The Railroad was actually constructed in Wilkes County.

It is also stated in the complaint (Record, p. 6, paragraph 23) that the said railroad was constructed in the said county of Wilkes, and is " the only one running within the limits of the county, and has been taxed by the county each and every year since its construction." The answer of the county commissioners (Record, p. 14, paragraph 23) also admits the completion of the said railroad to Wilkesboro, in the said county of Wilkes.

We have thus shown that even if this were an original proposition, which had never been passed upon by the Supreme Court of North Carolina, the said ordinance of 1868, standing by itself, was and is sufficient authority for the issue of these bonds of Wilkes county. It is not pretended or alleged by anybody that there is any act of the legislature repealing, or attempting to repeal, the said ordinance.

But we do not need to depend upon showing the correctness of this proposition as an original question. The point has been expressly adjudged by the Supreme Court of North Carolina in two cases, decided respectively in 1870 and 1877, known as the Hill and Belo cases, and these cases are conclusive in favor of the proposition that the said ordinance of 1868 gave, per se, lawful authority to issue these bonds.

We here print at length the said two cases just cited, fully and exactly as they appear in the official reports of the decisions of the Supreme Court of the State of North Carolina.

The report of the *Hill* case is as follows :

"John G. Hill et al. vs. The Commissioners of Forsythe County.*

[67 N. C., 367, June Term, 1870.]

An act of the General Assembly authorizing the People of a County to take stock in a Railroad Company, and to determine the question by a popular vote, and tax themselves to pay for it, is constitutional.

[*Taylor vs. Commissioners of Newbern*, 2 Jones Eq., 141; *Caldwell vs. Justices of Burke*, 4 Jones Eq., 323, cited and approved.]

Motion to vacate an injunction heard before CLOUD, J., at.....Term of Forsythe Superior Court.

This was an application on the part of the plaintiffs, who represented themselves as taxpayers and property holders of the county of Forsythe, in behalf of themselves and others, asking for an injunction against

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* "NOTE.—The case of *Simonton vs. The Commissioners of Burke*, involving the same question, was decided at this term, and for the same reasons judgment was given for the plaintiff."

the defendants, to restrain them from the imposition and collection of certain taxes, to pay instalments due upon a subscription made by the county of Forsythe to the North Western North Carolina Railroad Company. The following facts were found by the presiding Judge: 'A majority of the justices of the peace were present at the court house in Winston on the 25th day of March, 1868, and made an order to submit the question of subscription to the qualified voters of the county on the 4th day of April, 1868, and directed the sheriff to open the polls on that day.

That notice of this election was published in two newspapers, printed and circulated in that county; that said election was held at the time appointed, and at the usual places for holding elections in said county, and due return of the result of the voting was made to June Term of the County Court; that a majority of the jutices of the county were present, and on the bench at the said June Term, concurring in the orders made; that a large majority of the qualified voters of the county did vote on the question of subscription, and that a majority of the said votes were cast in favor of subscription; that a subscription of 1,000 shares of stock was made by the agent of the county appointed for that purpose on the_____day of June, 1868; that the defendants have laid taxes to pay the instalments due upon the subscription made to the North Western North Carolina Railroad Company for the years 1870-71.

Upon the foregoing state of facts the injunction, theretofore granted, was vacated by his Honor. Whereupon the plaintiffs appealed to the Supreme Court.

Several errors were assigned. The chief one and the only one discussed by the Court is: 'That the injunction was dissolved and defendants allowed to collect the taxes without any constitutional power in the legislature to authorize the subscription, and without a sufficient compliance with the acts of the General Assembly in that case made and provided.'

Scales & Scales and *Dillard & Gilmer*, for plaintiffs.

Clement, Masten and Batchelor, for defendants.

READE, J.: The main question is whether the legislature has the power to authorize the people of a county to take stock in a railroad, and to determine the question by a popular vote, and to tax themselves to pay for it. The Legislature in 1852 authorized the town of Newbern to take stock in the Neuse River

Navigation Company, for the use of the town, and to issue bonds and to levy a tax upon the property holders of the town to pay them. One of the taxpayers filed a bill to enjoin the collection of the tax, upon the ground that the act of the Legislature was unconstitutional. The question was fully argued and well considered, and the decision was in favor of the constitutionality of the act (*Taylor vs. Comrs. of Newbern*, 2 Jones Eq., 141).

And, again, in 1855, the Legislature chartered the Western North Carolina Railroad Company and authorized any county through which the road might pass to take stock if a majority of the justices of the peace and a majority of the voters should so determine, and to issue bonds and to levy a tax, &c. The county of Burke took stock, and one of the taxpayers filed a bill to enjoin, upon the ground that the act was unconstitutional. But this court decided in favor of the constitutionality of the act, and, in the opinion, it is said: 'In accordance with these views is the case of *Taylor vs. Newbern (supra)*, so that the question may be said to be settled here' (*Caldwell vs. Justices of Burke*, 4 Jones Eq., 323). The defendants' counsel cited, also, decisions in most of our sister States to the same effect. So that we repeat what was said in *Caldwell vs. Justices of Burke*, that the question is settled. We suppose that the plaintiffs' counsel felt at liberty to treat it as an open question, because in *Caldwell vs. Justices of Burke* there was a dissenting opinion by the present Chief-Justice; but the Court was unanimous upon this point. The dissenting opinion was only as to the power of a second vote of the people after they had rejected the proposition by a former vote.

There are divers other points in the complaint which seem to be unfounded, and besides they are unimportant. The main thing—the people's will—seems to have been fairly obtained. The stock was taken; bonds were issued; rights have vested; taxes have been levied and a portion of the installments have been paid, and taxes are now laid to pay other installments. The Board of Commissioners, who may be supposed to represent the popular will, are anxious to meet the obligations incurred, and the Court will not allow technical and frivolous objections, calculated to impair the public faith, to avail a *few*, who are indulged with

the privilege of suing for a *class*. Only their substantial rights will be considered.

We agree with his Honor that the injunction ought to have been dissolved.

There is no error. This will be certified, &c.

Simonton vs. Commissioners of Burke at this Term.

Per Curiam. Judgment affirmed."

NOTE that the subscription was made at the *June* Term, 1868, at which time the Ordinance was the only source of the authority to subscribe the stock and issue the bonds which were sustained in the *Hill* case just quoted, as well as in the *Belo* case next given, and where the facts relating to the subscription and bonds are more fully stated in the opinion of BYNUM, J.

The report of the *Belo case* is *verbatim* as follows:

"Edward Belo vs. The Commissioners of Forsythe County.

"[76 N. C., 489, January Term, 1877.]

"MUNICIPAL BONDS—CONDITIONS PRECEDENT—ACTION BY PURCHASER FOR VALUE—INJUNCTION BY TAX-PAYER—RETROSPECTIVE STATUTE—JUDGE'S CHARGE—EVIDENCE.

"1. Municipal bonds unpaid at maturity are dishonored like other commercial paper, and a purchaser after maturity holds them subject to all defects which would invalidate them in the hands of the original holder.

"2. In an action against a municipal corporation upon a bond issued by it, by a purchaser for value without notice, the plaintiff need only show a *power* in the corporate body to issue the bond.

"3. If a municipal corporation has the power to issue bonds upon certain conditions precedent, and such bonds are issued, the presumption is that the conditions were complied with and the bonds are *prima facie* valid. The corporation, however, can show the contrary, unless it is *estopped* by its own acts from so doing.

"4. When authority to issue municipal bonds upon the performance of certain conditions precedent is con-

ferred by statute upon a particular tribunal, such tribunal has the sole power to determine the fact whether the conditions have been performed or not."

"5. In an action by a *bona fide* purchaser for value against a County upon a bond issued by the former County Court of such County under an Act of the Legislature, the records of such Court are conclusive upon the County. The recitals in the bond are also conclusive upon the County and constitute an estoppel *in pais*.

"6. A taxpayer, for sufficient cause, can intervene in apt time and enjoin the issuing of municipal bonds, but this must be done before the bonds are issued and negotiated and pass into circulation as commercial securities.

"7. It is competent for the Legislature, by a retrospective statute, to validate an irregular or defective execution of a power by the authorities of a municipal corporation acting under a former statute where no contract is impaired, and the rights of third persons are not injuriously affected.

"8. Where the plaintiff testified on the trial below and introduced evidence of good character, and the defendant asked His Honor to charge the jury that they were not bound to believe the plaintiff in passing upon the issue, which His Honor refused, and charged the jury that 'they were not bound to believe anybody,' and added 'that, when men who have proved a good character before the jury testify, the presumption is that they will not lie,' &c. *Held*, not to be error.

"*Chester & Lenoir R. R. Co. vs. Comrs. of Caldwell*, 72 N. C., 486, cited and approved.

"This was an Action for a Mandamus to compel the defendants to provide for the payment of certain bonds alleged to have been issued pursuant to law by the County of Forsythe, tried at Spring Term, 1876, of Davidson Superior Court, before CLOUD, *J.*

"The action was commenced in Forsythe and removed to Davidson.

"The question presented for the decision of this Court is so elaborately discussed by Mr. Justice BYNUM, in delivering the opinion, that a statement of the facts is deemed unnecessary.

"Upon the issues submitted, and under the instructions of His Honor in the Court below, the jury rendered a verdict for the plaintiff. Judgment. Appeal by the defendants.

"*Mr. J. M. McCorkle* for plaintiff.

"*Messrs. Dillard & Gilmer, Shipp & Bailey and Watson & Glenn* for defendants.

BYNUM, J.: The North Western North Carolina Railroad Company was incorporated by an ordinance of the Convention of 1868, and, by Section 12 of the charter, the same power to subscribe to the capital stock of the company and subject to the like regulations and restrictions is given to Counties and Towns as was conferred by an Act incorporating the Atlantic & N. C. Railroad Company, passed by the Legislature of 1852. By section 34 of the latter Act the Justices of the County through or near which the road was located, "a majority concurring," are authorized to fix upon a subscription sum and submit it to the voters of the County. If the majority favored subscription, the Justices were to choose an agent to subscribe the stock voted and to prepare and issue County bonds, as the Justices should direct. The minutes of the Special Term of the County Court of Forsythe County, which ordered the proposition to be submitted to the popular vote, recite that a majority of the Justices were present, concurring in the order. The vote resulted in favor of subscription, and was so certified to the succeeding Court, held in June, 1868.

The minutes of that Term recite that 35 Justices were present, which number is admitted to be a majority of the whole number. At this latter Term of the Court, the Justices ordered the subscription to be made to the capital stock of the Company, and the bonds to be prepared and issued and sold by the agent then chosen. The bonds were accordingly put upon the market, and among them the identical bonds now sued on were by the agent sold to one Lemly, at his Banking House in Salem, on 5th of March, 1869. These bonds recite that they were 'authorized by an ordinance of 1868, by an order of the Court of Pleas and Quarter Sessions of Forsythe County at June Term, 1868, and re-enacted and ratified and confirmed by an Act of the General Assembly, ratified the 11th of August, 1868'.

At the same Term at which the subscription was made, the Justices assessed a special tax upon the

County to meet the semi-annual interest on the bonds. This Special Railroad Tax was annually assessed, levied and collected and applied in the discharge of the accruing interest upon the bonds from that time until 1872. A certificate for the stock subscribed was issued by the Railroad Company to the County, which it yet holds; an agent was annually chosen to represent and did represent the County stock in all the meetings of the Company. Under the new State Constitution of 1868, a Board of County Commissioners succeeded to all the powers and duties of the Justices, and up to 1872 this Board unanimously caused the levy and collection of the Railroad Tax and its application to the discharge of the coupons due upon the bonds. But the Board elected in 1872 refused to assess any further tax and to pay any further interest upon the bonds, alleging as the reason therefor that the subscription of stock so made by the County was illegal and void.

I. The plaintiff purchased the bonds in suit of Lemly in May, 1873, *after* they fell due. The bonds were then dishonored, like other commercial paper remaining unpaid at maturity, and the plaintiff is a purchaser with notice of all defects which would invalidate them in the hands of Lemly. He acquired no better title than his transferror. Any defense which could be asserted against the claim of Lemly can be maintained by the County against the plaintiff (1 Daniel on Negotiable Instruments, Sec. 782; *Arrents vs. Commonwealth*, 18 Grat., 773; 14 Minn., 79). The question then is: were the bonds invalid in the hands of Lemly, who purchased them from the County before maturity? The defense to the action is that the election could be ordered and the subscription of stock made only by the concurrence of a majority of the Justices of the County, and that in point of fact no such majority did concur, and, therefore, the subscription and the bonds issued therefor are void, even in the hands of a *bona fide* holder of the bonds before they fell due. This proposition cannot be maintained. Municipal bonds are negotiable instruments, and the legal rights of the holders of such paper do not so much rest upon abstract propositions, though true, as upon a system of practical rules found by experience to be essential to healthy commercial life. For the public protection and the convenience of trade, every intendment is made in favor of the validity of negotiable instru-

ments. Where bonds have been issued and sold in the market, and have come into the hands of a *bona fide* holder before maturity, as a general rule such bonds are *prima facie* valid, and the *onus* is upon the party impeaching them to show the contrary. This rule, however, which subsists between individuals, is much modified in respect to corporate bonds. Such bonds can be issued only in pursuance of a special grant of power, and the party claiming the benefit of such bonds must show a *power* in the corporate body to issue them. But if he is a purchaser for value without notice and before maturity, he need do no more. If a municipal corporation has the power to issue bonds only on a compliance with conditions precedent, as, for instance, as here, in pursuance of a popular vote and the bonds are issued, the presumption is that the conditions have been observed and they are *prima facie* valid, though the defendant may show the contrary unless he is *estopped* by his own acts from doing so. The principle, however, of equitable estoppel is a most important element in the transaction. For whether conditions precedent have been complied with is a matter of fact to be determined by some tribunal invested with the power and authority to decide it, and the decision when made should be final. It is not disputed that the *power* to make the subscription of stock and issue the bonds was conferred upon the County of Forsythe by the Ordinance of the Convention. It is equally clear that the tribunal which was authorized to issue the bonds only on compliance with conditions precedent was the sole tribunal to determine the fact whether the conditions had been fulfilled. In our case the Justices of the County, a majority concurring, was the Court or tribunal designated to carry the law into effect, and was the tribunal to decide whether the conditions had been complied with, and their decision is final in a suit by a *bona fide* holder of the bonds against the municipality. This determination of a question of fact by the Justices is manifested in two ways: first, by the records of their Court, and, second, by the recitals in the bonds issued by them. The Justices were authorized by the Act to take the sense of the people, declare the result and issue the bonds. Their declaration spread upon the Minutes of the Court and made a record is conclusive against the County in favor of all *bona fide* bondholders without notice. If they purchased, before maturity, they

need look no further (*Marcy vs. Township of Oswego*, 92 U. S. Rep., 637; *Dunning vs. Houston*, 18 Am. Rep., 253, and note). If there was fraud in making the record, or irregularities in the election which would vitiate the bonds upon exceptions taken in apt time, any taxpayer of the County could intervene and enjoin their issue. But this could only have been done before the bonds were issued, negotiated and passed into circulation as commercial securities, with the insignia of validity impressed upon their face (*Chester & Lenoir R. R. Co. vs. Caldwell Co.*, 72 N. C., 486). If intentionally or by neglect the taxpayers fail to protest, interfere or assert their legal rights; if they suffer the election to be held, a false result declared, the bonds to be issued and sold, and the proceeds received by their agents; if for the period of four years they annually submit to a special tax, which is applied in payment of the accruing interest on the bonds; if they still retain the Railroad stock without an offer to surrender it and continue to have it represented in the meetings of the Company, they cannot now disaffirm the acts of their public agents who issued and negotiated the sale of the bonds. They had the opportunity to intervene and protect themselves before the rights of third persons accrued. Their acquiescence is a ratification by the principal of the acts of his agent, and, according to all the leading authorities upon this question, the doctrine of equitable estoppel is a complete bar, and is strictly applied to the enforcement of these municipal obligations (2 Daniel on Neg. Instr., Sec. 479; *State vs. Vanhorne*, 7 Ohio St., 331; *Barrett vs. County Court*, 44 Mo., 201).

While the decisions are very uniform that the record of the Justices Court affirming the fact of compliance with the conditions precedent to the subscription of stock is conclusive and estops the County from denying the validity of the bonds in the hands of a *bona fide* holder before maturity, they are equally uniform in giving the same effect to the *recitals* in the bonds themselves that they had been issued in pursuance of the law which authorized their issue. The recital is a determination of the question, and the holder has the right to rely on it (*Town of Coloma vs. Evans*, 92 U. S. Rep., 484; *Lynch vs. Winnebago*, 16 Wall., 13; *Knox County vs. Aspinwall*, 21 How., 539). In delivering the opinion of the Court in *Coloma vs. Evans*, Mr. Justice STRONG says: "In the

leading case of *Knox County vs. Aspinwall*, the decision was rested upon two grounds. One of them was that the mere issue of the bonds containing a recital that they were issued in pursuance of the Legislative Act was a sufficient basis for the assumption by the purchaser that the conditions on which the County was authorized to issue them had been complied with, and it was said the purchaser was not bound to look further for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to the *Royal British Bank vs. Turquand*, 6 Ellis and Blackburn, 327, a case in the Exchequer Chamber, which fully sustains it and the decision in which was concurred in by all the Judges. This position has been more than once re-affirmed in this Court. It was in *Moran vs. Miami County*, 2 Black., 732; in *Mercer County vs. Hacket*, 1 Wall., 83; in *Supervisors vs. Schenck*, 5 Wall., 784, and in *Meyer vs. Muscatine*, 1 Wall., 384. It has never been overruled, and whatever doubts may have been suggested respecting its correctness to the full extent to which it has been sometimes announced, there should be no doubt of the entire correctness of the other rule asserted in *Knox vs. Aspinwall*. That has been so firmly seated in reason and authority that it cannot be shaken." To the same effect is the recent case of *Humbolt Township vs. Long*, 92 U. S. Rep., 642. See, also, a valuable summary of the doctrine as established by the decisions of the Supreme Court of the United States by Judge DILLON, 'Law of Municipal Bonds,' Sec. 11, the result of which is that the recitals in the bonds to that effect are conclusive of compliance with the conditions precedent, and constitute an estoppel *in pais* upon the municipalities.

Up to this point the discussion has been upon the idea that the bonds were, in fact, irregularly issued, and were good only in the hands of a *bona fide* purchaser before maturity and without notice. It may well be doubted whether this is not conceding too much. Suppose the plaintiff had been the original purchaser from the County after the bonds matured and, therefore, fixed with notice, and suppose, further, that the County, in defense, could go behind the action of the Justices and the recitals in the bonds, it by no means follows that their invalidity could then be established, for the County was clothed with the power to issue them, and it is admitted that a

majority vote sanctioned the subscription of stock and the issue of the bonds. The real condition precedent was the consent of the tax payers, and that had been thus regularly obtained. The provisions of the Act as to the mode of submitting the question were subordinate and conducive to the main purpose, and may, therefore, be properly considered as directory only and not of the essence. When the subscription was voted there is authority and reason for asserting that the Justices could have been compelled by process of law to make the subscription, unless in defense they could have shown that the election was not fairly conducted, but was influenced by the fraud of the Railroad Company (People vs. Supervisors, 27 Cal., 655). As the case is presented to us, that question does not arise, and we do not decide it.

So far, as to the rights of the parties under the original Act of the Railroad Corporation, granted by the Convention of 1868.

II. But the plaintiff further relies upon a subsequent Act of the Legislature, ratified the 11th of August, 1868, which confirms the original charter of March, 1868. This Act in express terms 'ratifies all Acts and things heretofore done under the provisions of said ordinance,' and confers upon the 'Board of Commissioners of the County full power and authority to levy from time to time such tax as may be sufficient to pay the subscription made by said County to the capital stock of the North Western North Carolina Railroad Company and any interest due thereon, or to liquidate any debt created by the County in borrowing money to pay such stock subscription.'

The competency of the Legislature to enact retrospective statutes to validate an irregular or defective execution of power by a County corporation is well settled. In *St. Joseph Township vs. Rogers*, 16 Wall., 644, the election at which the subscription was approved was held before the law authorizing the subscription, and the Court there decide that this and all defective subscriptions of the kind may be ratified where the Legislature could have originally conferred the power, and that such laws, when they do not impair any contract or injuriously affect the rights of third persons are never objectionable (Dillon's Law of Municipal Bonds, Sec. 21; *Butler vs. Dubois*, 29 Ill., 105; 49 Mo., 225). The ratification operates as a previous author-

ity (2 Daniel on Neg. Instr., 492; Cooley on Const. Lim., Secs. 370-381; *Knap vs. Grant*, 27 Wis., 147).

Declaring, as we do, that the ratifying Act of August, 1868, was a curative Act, and validated both the County subscription and the issue of the bonds, if any defects existed therein—and it has been one purpose of this opinion to show that the bonds were valid in the hands of *bona fide* holders without the aid of this healing Act—the proposed evidence of the defendant became immaterial and irrelevant. As a matter of law, the bonds were valid and the Court did not err in so declaring.

The only issue submitted to the jury was: 'Is the plaintiff the *bona fide* owner and for value of the bonds and coupons mentioned in the pleadings, and was he such at the commencement of the action?' Upon the trial of this issue the plaintiff was introduced and testified as a witness. The defendant requested the Court to charge the jury that they were not bound to believe the plaintiff in passing upon the issue. The Court refused so to charge, but told the jury 'they were not bound to believe anybody, and added that, when men who have proved a good character before the jury testify, the presumption is that they will not lie, and that there was evidence before the jury that the plaintiff was a man of good character, and no witness had been introduced to assail his character.' There was no error in that. Without this reinforcement of a proved good character, men are presumed to tell the truth. The whole theory of jury trials, and, indeed, of all human intercourse, is based upon that presumption.

His Honor expressed himself with needless emphasis, but we do not see that the jury were misled thereby.

It is estimated that the municipal indebtedness of this country has already reached the enormous sum of $900,000,000, and is rapidly increasing, nearly the whole of which is evidenced by negotiable securities issued for almost every conceivable purpose by cities, counties and townships. These bonds represent a large portion of the wealth of the country, and, whether held for investment or active employment, they enter into the complex business of commercial life. This municipal power to issue bonds, which is the growth of the last thirty years, has already overwhelmed the country with an indebtedness which threatens political society and social order to their foundations. No check against our indebtedness is so effectual as that

you must pay as you go, but this is utterly disregarded in the legislation which authorizes the issue of bonds payable at a remote future period. As soon as the sting of taxation is felt, the self-burdened people cast about for relief, and, after some hesitating scruples, plunge into repudiation or other methods involving the sacrifice of public faith, with its dismal train of evils. No refuge for repudiation can be found in the legal tribunals of the country. They have sternly resisted every subterfuge to escape the just obligation of these contracts. No branch of the law has been more thoroughly investigated and discussed with the view of setting it upon a just and pure foundation. And it is the glory of the law that, while by the application of legal principles it enforces the discharge of such obligations, it at the same time preserves the public morals in maintaining the integrity of solemn contracts inviolable. In no other practical way perhaps will the taxpayers be sooner brought to a more vigilant watchfulness over their own affairs, and a more careful selection of their public agents (See Dillon on Municipal Bonds, Sec. 1).

There is no error.

Per Curiam. Judgment affirmed."

NOTE that in these cases of *Hill* and *Belo* the very ordinance of the convention of 1868, involved in the present case, was before the Supreme Court of the State of North Carolina, and that court distinctly held that that ordinance *per se*, without the aid of any legislative act, conferred the power upon the county of Forsythe to issue the county bonds in aid of the Northwestern North Carolina Railroad Company, the very railroad to aid which the bonds in question in the present case were issued by the county of Wilkes. The court says in its opinion in *Belo vs. Commissioners supra :*

" BYNUM, J. : The North Western North Carolina Railroad Company was incorporated by an Ordinance of the Convention of 1868, and by Section 12 of the charter the same power to subscribe to the capital

stock of the company and subject to the like regulations and restrictions, is given to Counties and Towns, as was conferred by an Act incorporating the Atlantic and N. C. Railroad Company, passed by the Legislature of 1852. By Section 34 of the latter Act, the Justices of the County through or near which the road was located, 'a majority concurring,' are authorized to fix upon a subscription sum and submit it to the voters of the County. If the majority favored subscription, the Justices were to choose an agent to subscribe the stock voted and to prepare and issue County bonds, as the Justices should direct. The minutes of the Special Term of the County Court of Forsythe County which ordered the proposition to be submitted to the popular vote, recite that a majority of the Justices were present, concurring in the order. The vote resulted in favor of subscription and was so certified to the succeeding Court, held in June, 1868."

The court says further :

"But the Board elected in 1872 refused to assess any further tax and to pay any further interest upon the bonds, alleging as the reason therefor, that the subscription of stock so made by the County was illegal and void.

* * * * * *

"The defence to the action is that the election could be ordered and the subscription of stock made only by the concurrence of a majority of the Justices of the County ; and that in point of fact, no such majority did concur, and therefore the subscription and the bonds issued therefor are void, even in the hands of a *bona fide* holder of the bonds before they fell due. This proposition cannot be maintained."

The court also says :

"It is not disputed that the *power* to make the subscription of stock and issue the bonds was conferred upon the County of Forsythe by the Ordinance of the Convention. It is equally clear that the tribunal which was authorized to issue the bonds only on compliance with conditions precedent was the sole tribunal to determine the fact whether the conditions had been fulfilled."

Further, in its decision, the court says:

"*The county was clothed with the power to issue them* [the bonds], and it is admitted that a majority vote sanctioned the subscription of stock and the issue of the bonds. * * *

"So far as to the rights of the parties under the original Act of the Railroad Corporation, granted by the Convention of 1868.

"II. But the plaintiff further relies upon a subsequent Act of the Legislature, ratified the 11th of August, 1868, which confirms the original charter of March, 1868. * * *

"Declaring as we do that the ratifying Act of August, 1868, was a curative Act and validated both the County subscription and the issue of the bonds, if any defects existed therein—**and it has been one purpose of this opinion to show that the bonds were valid in the hands of bona fide holders without the aid of this healing Act**—the proposed evidence of the defendant became immaterial and irrelevant. As a matter of law the bonds were valid, and the Court did not err in so declaring."

The Supreme Court of the State of North Carolina has thus distinctly declared that the said ordinance of 1868, printed in the record in this case, page 24 *et seq.*, incorporating the Northwestern North Carolina Railroad Company was *per se* and without any legislative act sufficient authority for a county to subscribe to the capital stock and issue county bonds in payment therefor. The court distinctly put its decision upon the ground that the "bonds were valid in the hands of *bona fide* holders without the aid of this healing act;" that is, under the ordinance of 1868, and without the aid of the act of August 11th, 1868. This is not any mere dictum of the court, but is the ground on which the court expressly rested its decision. It is true that the court also rested its decision upon the further ground that, "if any defects existed in the bonds," "the ratifying act of August 11, 1868, was a curative act and valid-

ated both the county subscription and the issue of the bonds." The court put its decision on both grounds, and not on either ground to the exclusion of the other. The language of the court as respects both of these grounds, therefore, amounts to a decision, and its language on either ground is not a mere dictum.

Furthermore, this decision in the *Hill case* made in 1870, and this decision in the *Belo case* made in 1877, construing this ordinance of the Constitutional Convention of 1868, was a construction upon which the purchasers of the bonds in question in the present case had a right to rely. When the bonds in the present case were issued in 1889 these two decisions above quoted stood unreversed and unquestioned in the officially printed reports of the Supreme Court of North Carolina, construing the said ordinance. At the time of the issue of these bonds there was not a word or syllable in the said reports contrary to the said decisions. The said ordinance of the Constitutional Convention has not been in any wise changed, either by constitution or by statute, from what it was when the above-quoted opinions of the Supreme Court of North Carolina, in the two Forsythe county cases, were rendered.

This present case, therefore, is brought directly within the principles announced by the Supreme Court of the United States in numerous cases in which this Court has held that when a contract, and especially one which is evidenced by commercial paper, was valid under the constitution and statutes of a state, as then construed by the State Court, it will be held valid by the Supreme Court, notwithstanding the fact that after such contract was made the state Court may, as in the case now at the bar, have changed its decisions.

The provisions of the constitution of the State of North Carolina, mentioned in the said first question, certified by the Circuit Court of Appeals (Record, p. 42)—namely, Article II., sections 14 and 16, and Article V., sections 1, 4, 6 and 7, and Article VII., section 7—were precisely the same at the date of the rendering of the decisions in the two Forsythe county cases above quoted as they were when the bonds in question in the present case were issued.

As stated above, the said ordinance of the Constitutional Convention of 1868 had not been repealed, nor had the legislature attempted to repeal it. Certain additional acts had been passed ; but if on this branch of the argument it be conceded, merely for the sake of the argument, that all of those acts had fallen, because not properly enacted, nevertheless the said ordinance of the Constitutional Convention of 1868 stood when these bonds were issued, and stands to-day, precisely the same as it stood when the bonds were issued which were in question in the two Forsythe County cases above quoted.

Recital of the Act of February 20, 1879, in the bonds is immaterial.

It is immaterial that the bonds in question in the present case (Record, p. 24) recited that they were issued by authority of the act of February 20th, 1879, which was an amendment of the Constitutional ordinance of 1868, and did not recite that they were issued under the ordinance itself, for it is well-settled law that if there was, in fact, legislative or legal authority for the

issue of bonds, it is immaterial that the bonds recite another legislative act which did not give such authority.

A decision of this Court exactly in point is *Anderson County Commissioners vs. Beal*, 113 U. S., 227 (1885). In that case Mr. Justice BLATCHFORD, giving the opinion of this Court, says (p. 236):

"It is not disputed that the recital in the bond that it was issued under the act of February 26th, 1866, Sess. Laws of Kansas, 1866, ch. 24, page 72, was an error * * * (p. 237). It is very clear that there was legislative authority under the act of 1869 for the issuing of the bonds in question. There was an election, and the requisite majority of those who voted assented to the proposition for the subscription to the stock and the issue of the bonds, and the subscription was made by the proper officers, and they issued the bonds," etc. * * * (p. 238). "The bond recites the wrong act, but if that part of the recital be rejected there remains the statement that the bond 'is executed and issued' 'in pursuance to the vote of the electors of Anderson county of September 13th, 1869.' The act of 1869 provides that when the assent of a majority of those voting at the election is given to the subscription to the stock, the county commissioners shall make the subscription and pay for it, and for the stock thereby agreed to be taken, by issuing to the company the bonds of the county."

This Court, therefore, held the bonds valid, notwithstanding they recited the wrong act.

In Dillon on "Municipal Corporations," Fourth Edition, section 523, note, it is stated:

"That bonds recite as authority for the issue a wrong act of the legislature does not necessarily invalidate them, if it can be shown that they were in fact issued under an act conferring the power," (citing *Anderson County Commissioners vs. Beal, supra*, and other cases).

See, also, to the same effect: *Knox County vs. Ninth*

National Bank, 147 U. S., 91 ; and *Cairo vs. Zane*, 149 U. S., 122.

Furthermore, even if the rule were not as laid down is *Anderson vs. Beal*, *supra*, these bonds recite (p. 24) that they are issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, 1879, entitled "An Act to amend the charter of the Northwestern North Carolina Railroad," etc. The holder of these bonds is therefore notified of this act, but on examining this act he will further see that this act (Record, p. 29) is an *amendment* "of the ordinance of the convention of one thousand eight hundred and sixty-eight, ratified the ninth day of March, one thousand eight hundred and sixty-eight." As said ordinance gave authority for the issue of these bonds, and as the holder of the bonds is thus, by reference to the act of February 20, 1879, referred to the said ordinance of March 9, 1868, which the said act of February 20, 1879, amends, there is no reason why a bondholder may not examine and refer to the said ordinance as authority for the issuance of the bonds in question.

In the case of *Anderson vs. Beal*, *supra*, the Supreme Court of the United States held that even if the bond recited a wrong act, it was competent to rely upon another act which really did give authority, although such other act was not recited. Much more is it competent, in the present case, to refer to this ordinance of March 9, 1868, as the bondholder did, by reference as above stated, have notice of the said ordinance by the recital in the bond and by an examination of the act of February 20, 1879, there recited.

The learned judge who gave the majority opinion in the case of *Commissioners of Wilkes Co. vs. Call*, 123

N. C., 308, 1898, cited the case of *Gilson vs. Dayton*, 123 U. S., 59, as holding that the recital of a wrong act is fatal to the validity of bonds. That case does not hold any such thing. On the contrary, the whole case is stated in the opinion of this Court, given by Mr. Chief Justice WAITE, the opinion being in full as follows—to wit (p. 61):

"The judgment in this case is affirmed on the authority of *Crow vs. Oxford*, 119 U. S., 215. See also *Post vs. Supervisors*, 105 U. S., 667, 691. It appears on the face of the bonds sued for that the subscription was made under and by virtue of the act of February 18, 1857, and that the vote of the town was taken at a special town meeting called upon the 'application in writing of fifty legal voters of said town', which is in accordance with the provisions of that act. The act of March 6, 1867, which the plaintiff now claims is sufficient to support the bonds, requires that the application for the town meeting shall be made by 'twenty voters and *tax-payers*.' The record does not show that any of those who signed the application for the meeting at which the vote was taken were taxpayers. It thus appears from the bonds themselves not only that they were issued under the act of 1857, but that they were not issued under that of 1867."

It thus appears that in the case of *Gilson vs. Dayton* that the act which might, in fact, have given authority was not followed, as there was not any application of *taxpayers;* and, of course the bonds in that case were held invalid.

The late decision 1898 by the State Supreme Court (123 N. C., 308) **overruling the Hill and Belo cases is intrinsically unsound and proceeds upon mistaken data.**

The Supreme Court of North Carolina, in the case of *Commissioners of Wilkes Co. vs. Call*, 123 N. C., 308,

decided in 1898, by a bare majority, long after these bonds were issued, has undertaken to hold for the first time that the said ordinance of March 9, 1868, adopted by the constitutional convention of 1868 (Record, p. 24) did not confer any power upon Wilkes county to subscribe for these bonds. In attempting to do this the court has undertaken to overrule the decisions in the *Hill case* and the *Belo case*, concerning the Forsyth county bonds, decided in 1870 and 1877, respectively, and above quoted. The court, in the *Call case*, by a bare majority, said that these two cases were distinguishable, but it gave no real reason for any distinction. In some respects the statements of the court in *Commissioners vs. Call* are obviously incorrect; for example, the court says (p. 318):

"Another important point of difference is that the Forsyth county bonds were voted and subscribed within a few months after the passage of the ordinance, before whatever power it may have given, if any, had expired by its own limitation."

It is impossible to conceive what the court meant by the ordinance of 1868 expiring "by its own limitation." There is no limitation in the ordinance which makes it expire. The *Hill* and *Belo cases*, above quoted, do, as we have already seen, expressly decide that the ordinance gave power to issue the bonds there in question.

Again, the Supreme Court of North Carolina, in the *Call case*, say:

(p. 321) "The ratification of the constitution on the 24th day of April, 1868, when it went into effect for all domestic purposes, annulled all special powers remaining unexecuted and not granted in strict accordance with its requirements. Article II., Section 14,

is as follows: 'No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal.' Article VII., Section 7, is as follows: 'No county, city, town or municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein.'"

This proposition of the court, and the sections of the constitution cited by it, do not at all affect the question of the continued existence of the said ordinance of the constitutional convention incorporating the Northwestern North Carolina Railroad Company, ratified March 9th, 1868. Article II., Section 14, of the constitution, quoted by the court, is as follows: "No law shall be passed," etc. This, by its very terms, and under all the authorities, is a direction to the legislature. "No law *shall* be passed," etc., obviously means shall hereafter be passed. This Section 14 occurs in Article II., which is devoted to directions to the legislative body, and it prescribes a rule of procedure for the future enactment of laws by the legislature. It does not either expressly or impliedly repeal or annul any existing laws of the state. "It does not purport to take away any authority already granted. It only limits the power of the legislature in granting such authority for the time to come."

This question was before the Court in *County of*

Scotland vs. Thomas, 94 U. S., 682. The decision of the Court on that point is stated as follows (p. 688):

"The clause of the Constitution on which the defendant relies is the fourteenth section of art. II., and is as follows: 'The general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto.' This prohibition, it will be observed, is against the legislature's authorizing municipal subscriptions or aid to private corporations; it does not purport to take away any authority already granted. It only limits the power of the legislature in granting such authority for the time to come."

See, also, to the same effect:

County of Callaway vs. Foster, 93 U. S., 567.

County of Henry vs. Nicolay, 95 U. S., 619.

Louisiana vs. Taylor, 105 U. S., 454.

Macon County vs. Shores, 97 U. S., 272.

Howard County vs. Paddock, 110 U. S., 384.

See, also, other cases cited in "Dillon on Municipal Corporations," Fourth Edition, Section 542, Note.

The principle of these decisions is recognized by the Supreme Court of the United States in *Norton vs. Brownsville*, 129 U. S., 479, where this Court, Mr. Chief-Justice FULLER giving the opinion, after citing certain other cases which arose under provisions of a constitution which directly prohibited counties, cities, etc., from issuing railroad aid bonds, says (p. 490):

"These cases sufficiently illustrate the distinction between the operation of a *constitutional limitation upon the power of the legislature*, and of a constitutional inhibition upon the municipality itself. *In the former case past legislative action is not necessarily affected*, while in the latter it is annulled."

Article VII., Section 7, of the constitution of North Carolina, is a " constitutional inhibition upon the municipality itself," but it only inhibits the issue of railroad aid bonds by a municipality " unless by a vote of a majority of the qualified voters therein." There was a vote of a majority of the qualified voters in the case of these Wilkes county bonds, and, therefore, this " constitutional inhibition upon the municipality itself " was not violated.

Ordinance of March 9, 1868, not repealed by the Constitution or any legislative act and was as to the power to issue bonds in full force in 1889 when the bonds in suit were issued.

Article II., Section 14, of the Constitution, does not either expressly or impliedly require the re-enactment of existing legislation, even statutory legislation, much less ordinance legislation enacted by the Convention that framed the Constitution. Not only so, but another part of the constitution, Article IV., Section 19, expressly provides:

" The laws of North Carolina, not repugnant to this constitution, or the constitution and laws of the United States, shall be in force until lawfully altered."

Also Article VII., Section 12, provides:

" All charters, ordinances and provisions relating to municipal corporations shall remain in force until legally changed, unless inconsistent with the provisions of this constitution."

There are no other repealing provisions in the Constitution of 1868. No attempt is made in the Consti-

tution of 1868 to repeal the said ordinance of March 9, 1868.

[That a "county" is a "municipal corporation" within this Section 12 appears from the language of Section 7 of the same Article VII., which speaks of "county, city, town or other municipal corporation."]

This Article II, Section 14, does not provide any method of passage of laws *theretofore* enacted, and has no application to any laws previously passed.

Article VII, Section 7, however, does operate directly upon the county or other municipal corporation, and it does provide that such a county "shall not contract any debt," etc., "except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." This section, however, does not expressly or impliedly repeal even any previously-existing statute. Much less does it repeal this ordinance of the Constitutional Convention. What this section does do is to operate directly upon the municipality and to provide that the municipality "shall not contract any debt," etc., "unless by a vote of a majority of the qualified voters therein." Such a vote was had in the present case, and this section of the constitution therefore, did not prohibit the issue of these bonds of Wilkes County.

Applying this language of Article VII, Section 7 of the constitution to the said ordinance of the constitutional convention, it is obvious that even if this ordinance were in the nature of a statute only, the ordinance would not be repealed, because the said ordinance, by referring to the act of 1852, Secs. 33-37, above quoted, expressly provides for the holding of an election by the qualified voters of the county to vote upon the question of the issue of the bonds. The

said ordinance, therefore, is not inconsistent with the said Article VII., Section 7, of the constitution, and was not repealed by it. We have already seen that the said ordinance was not repealed by Article II., Section 14, of the constitution.

Furthermore, the said Article II., Section 14, has no application to the said ordinance. The said ordinance is not a statute, and is, therefore, not within Article II., Section 14. This Section 14, is addressed to the legislature, and the words "no law shall be passed," etc., in the said Section 14 mean no law enacted by the legislature. The said ordinance was enacted by the constitutional convention, and the language of Article II., Section 14, is wholly inapplicable. For example, there were not two houses in the constitutional convention, and, therefore, the ordinance could not have been agreed to by *each house respectively*, etc., etc.

The Supreme Court of North Carolina, then, committed an obvious and plain error in holding, or attempting to hold, that either Article II., Section 14, or Article VII., Section 7, repealed, or undertook to repeal, the said ordinance adopted by the constitutional convention.

Moreover the said ordinance and Sections 33 to 37 of the Act of 1852, made part of it, fully comply with Sections 6 and 7 of Article V. of the Constitution, as fully appears from the "special" character of said Ordinance—even if said sections 6 and 7 can apply to said Ordinance.

The true nature and effect of the said ordinance incorporating the Northwestern North Carolina Railroad Company appears not to have been considered by the Supreme Court of North Carolina in the said *Call case*. This is, perhaps, not surprising, as there was no brief

and no counsel before the court in that case to present anything in opposition to the claim of the county commissioners that these bonds were invalid.

The Said Ordinance Is of the Same Dignity as the Constitution, and as Operative per se by its Own Intrinsic Force and Efficacy. It is not Repealed, Affected or Modified by the Constitution.

A little reflection and an examination of the journals of the constitutional convention of North Carolina of 1868 show that the said ordinance chartering the Northwestern North Carolina Railroad Company was itself in the nature of a constitution, and was not intended to be affected or repealed or modified by anything that appeared in the constitution itself, although, as a matter of fact, there is nothing in the said ordinance, and in the issue thereunder of the bonds of Wilkes county involved in the present case, which is at all contrary to what appears in the constitution of North Carolina. Our proposition now is that the said ordinance of the constitutional convention, being adopted by the said convention, and being ordered printed and put in force as such ordinance of the convention, was in the nature of a special provision governing the issue of these bonds, and, if it were necessary, as it is not, we could maintain the position that this ordinance was to be in force as the special law governing these bonds, whatever might appear in the constitution to the contrary.

The said ordinance is of the same dignity as the constitution, being passed by the same body that

framed the constitution. It was ordered (Section 14) " to be in effect from and after its passage " (Record, p. 27). No power was reserved to alter or repeal it. When accepted by the railroad company which it chartered, as it was accepted, it became, under the Dartmouth College case, a contract with that company, and not capable, there being no reserved power to that effect, of being repealed in any of its essential provisions. The record as well as the decisions in the *Hill* and *Belo* cases, shows that it was accepted by the company prior to April 24, 1868, by action taken under it, pursuant to its provisions, in respect of taking steps to procure subscriptions to its stock by the County of Forsythe, and in other respects.

On its face the ordinance of March 9, 1868, shows that the constitutional convention was dealing with a situation which it deemed exceptionally important, and, therefore, it directly chartered the Northwestern North Carolina Railroad Company, giving it a corporate existence for ninety-nine years, and conferring upon it other powers, including the power of *counties* to make subscriptions to its stock, and also specially providing for State aid to the extent of $10,000 a mile for the first division, between its eastern terminus and Winston and Salem ; this last provision not being dependent upon any further vote or action on the part of the State, and clearly was not repealed by the subsequent adoption of the constitution itself.

As said above, the ordinance was specially ordered by the Convention itself to take effect unconditionally from and after its passage on March 9, 1868, and if the constitution had been voted down in April, 1868 and never adopted by the people, the said ordinance of the 9th of March, 1868 would

have been in full force and unaffected. Dealing with the local and exigent situation, and dealing with it completely in and by the said ordinance, it was not intended that this ordinance should be repealed in any degree, or in any of its provisions, by the constitution, even if the constitution should be adopted and put in force; and even if the constitution should contain inconsistent provisions—and it did not contain any.

The ordinance of 1868 is viable in and of itself, and autonomous, and we can, as above suggested, well maintain that no part or provision of it could be or was repealed or affected by any inconsistent provision in the constitution. But it is not necessary in this case to maintain that proposition in its full extent for the reason that **there is nothing in the constitution as adopted, which repeals or annuls the power in Wilkes County to issue the bonds in question, or which is inconsistent with said ordinance, as we now proceed further to show.**

There in neither an EXPRESS **nor** IMPLIED REPEAL **of the Ordinance of March 9, 1868, and the issue of the bonds in suit did not violate any provision of the Ordinance or of the Constitution.**

There being no *express* repeal by the constitution of the ordinance of March 9, 1868 (which ordinance includes Sections 33, 34, 35, 36 and 37 of the charter of the North Carolina and Atlantic Railroad Company, being chapter 136 of the laws of North Carolina, 1852 (printed in the record, pp. 31 and 32), at the very utmost the constitution would affect the said ordinance

only so far as it was plainly inconsistent with it; that is to say, it would be a *repeal*, if at all, *by implication*. On the contrary, there being no conflict between the ordinance and the constitution, relating to the power to issue these bonds, the constitution itself, in express terms, recognizes and continues the ordinance in force, even if it be treated as an ordinary enactment, since Section 19, Article IV., of the constitution provides as follows:

"SECTION 19. The laws of North Carolina, not repugnant to this constitution or the constitution and laws of the United States, shall be in force until lawfully altered."

Now, if you lay the constitution adopted April 24, 1868, alongside the ordinance of March 9, 1868, no repeal or annulment of the power of counties, mentioned in the ordinance of March 9, 1868, to take stock or issue bonds will be found. On the contrary, the scheme of the constitution and the scheme of the ordinance are the same. The ordinance authorizes counties on or near the line of the chartered railroad to subscribe for stock on a vote of a majority voting of the qualified voters of the county. The constitution, Article VII, Section 7, authorizes counties to become subscribers to the stock of railroad companies on "a vote of the majority of the qualified voters therein;" that is to say, both under the ordinance and constitution counties may be authorized to subscribe stock when sanctioned by a majority of the qualified voters of the county, and such a majority did sanction the issue of the bonds of Wilkes county in the present case.

It is alleged in the complaint (Record, p. 6, paragraph 22) as follows:

"That the county of Wilkes, acting through its board of commissioners, and in accordance with the ordinance and acts, as above set out, subscribed the sum of one hundred thousand dollars to the capital stock of the North Western North Carolina Railroad Company, the proposition to subscribe the said amount having *been submitted to the qualified voters of the county at an election held according to law, and a large majority of the said qualified voters having voted in favor of the same.*"

This is admitted in the answer (Record, p. 15, paragraph 22) as follows:

"These respondents, still denying the authority of the former commissioners to issue bonds or subscribe to the cspital stock to the said company, admit that they did subscribe and issue bonds in the amounts alleged in the complaint, and that *it was ascertained and declared that a majority of the qualified voters of Wilkes county had voted in favor of making such subscription, and that it is now too late to question said finding as to said vote.*"

Moreover, the bond recites (Record, p. 24) that the said issue of bonds now in question was

"authorized by *a vote of a majority of the qualified voters of Wilkes county*, by an election regularly held for that purpose on the 6th day of November, A. D. 1888, and by an order of the board of commissioners of Wilkes county, made on the first day of April, A. D. 1889."

That this recital creates an estoppel as to the vote, even though the ordinance is not recited in the bond, see *Anderson County vs. Beal*, 113 U. S., 227, quoted *supra*, p. 36.

So that in the present issue of bonds by Wilkes county there is no provision either of the ordinance of March 9, 1868, or of the constitution of the state, which was adopted April 24, 1868, repealing, annulling, or in any way impairing or affecting the power of Wilkes county to issue the bonds in question.

As elsewhere pointed out in this brief *(supra,* p. 40,*)* Section 14 of Article II has no application, because that refers in the language "No law shall be passed," etc., to laws which shall be hereafter passed, and, also, refers only to laws to be passed by the General Assembly, since it prescribes the method and manner of its passage by readings on three different days, and taking the ayes and noes on the second and third readings in *each house,* and entering the same on the journal, &c., &c. These requirements in their terms and nature can have no reference or application to the ordinance of 1868, passed by the Constitutional Convention, which was *only one house.*

We proceed to consider briefly the journals of the constitutional convention, showing that it was the true intent and purpose of that convention that the said ordinance should operate by itself, and independently of the constitution.

The convention met on January 14, 1868. On February 13, 1868, the committee on the provisions of the constitution which should relate to the legislature made its report (Journal, p. 189). Section 17 of the said report was presented as it now appears as Section 14 of Article II. of the constitution, as printed in the Code of 1883, except that the present words "and agreed to by each house respectively" were inserted, instead of the words "agreed to by a majority of the whole number of members of each house respectively," as they appeared in the first report (Journal, p. 197). This report which now constitutes Article II. of the constitution of 1868 of North Carolina, was on Feb-

ruary 13, 1868, read and considered section by section, and the entire report was adopted, including Section 17—now Section 14—as above stated and quoted.

On March 5, 1868, the committee on counties, cities, towns and villages, their offices, organization and powers, presented their report, which report constitutes now what is Article VII. of the constitution of 1868. The said report contained, among others, Section 8, now Section 7, exactly as quoted above, except that the words "*municipal* corporation" now appear where, in the original report, the words were "*political* corporation" (Journal, p. 315). Included in this report was also Section 13, now Section 12, of Article VII., the same as it now stands and as it is above quoted in this brief, page 42. The said report on counties, etc., was, on March 5, 1868, considered section by section, and was, on the same date, ordered to be placed on its third and final reading and passage on March 7. On the latter date—to wit, March 7, 1868—after reading and considering the said report, the Convention adopted it by a yea and nay vote (Journal, p. 352).

Afterwards—to wit, on March 9, 1868—the committee on internal improvements, to whom had been referred, on February 24, an ordinance to incorporate the Northwestern North Carolina Railroad Company, the very ordinance now printed in the record in this case (p. 24), reported to the convention that they had the same under consideration, and recommended its passage (Journal, p. 363). This ordinance, after being considered by the convention, was then adopted by a vote of 84 yeas and 11 nays, the same being in the form set forth in the record in this case (p. 24).

Thus, the facts were that the convention, after hav-

ing considered, passed upon and formally adopted the whole of Article II., relating to the legislature of the state, including the present Section 14 and other sections, and after having considered and formally adopted Article VII., including Section 7 and other sections relating to counties, towns, etc., which the Supreme Court of North Carolina now say were intended to repeal the ordinance incorporating the Northwestern North Carolina Railroad Company, considered and adopted and put into immediate effect the said ordinance. *The chronology of the acts of the convention completely refutes the proposition now advanced by the Supreme Court of the state.* It is absurd to suppose that this convention solemnly adopted, on the 9th of March, 1868, this ordinance to incorporate the Northwestern North Carolina Railroad Company with the intention of having that ordinance repealed and overthrown by what that convention had already done on the previous dates of February 13, 1868, and March 5 and 7, 1868. On the contrary, this convention intended that this ordinance adopted on the 9th of March, 1868, should stand, and should be the law governing this Northwestern North Carolina Railroad Company. No other possible conclusion can be sustained.

Furthermore, that all the ordinances of the Convention should go into effect and remain in force, is, if possible, made more certain by the subsequent action of the convention. On March 13, 1868, the convention passed the following ordinance, to wit (Journal, p. 437):

"An ordinance in relation to the printing of the constitution, ordinances and resolutions.

"SECTION 1. Be it ordained by the people of North Carolina in convention assembled, That *every ordinance*

and resolution *of this convention*, when the same shall have been enrolled, shall be authenticated by the signatures of the president and the principal secretary of this convention, and the date of its final passage shall be affixed thereto, and *such ordinances* and resolutions *shall go into effect* from such date, unless some other be prescribed, or unless such ordinance or resolution shall be required to be submitted to the people for ratification.

"SECTION 2. Be it further ordained, That all such enrolled ordinances and resolutions, and also the journals of the convention and all the papers belonging to the convention, immediately upon the adjournment thereof, shall be deposited by the president and secretary of the convention in the office of the secretary of state for the State of North Carolina."

[Sections three and four relate to the printing of copies of the constitution, ordinances and resolutions, and the publication in newspapers, and section five relates to the compensation of the secretary.]

Section 6 provides:

"Be it further ordained, That the *printed copies* of the constitution, and *of all the ordinances* and resolutions of the convention printed by authority of the convention, or which shall be hereafter printed by authority of the General Assembly of North Carolina, shall be admitted as evidence in all courts of this State" (Journal, p. 437).

Here, then, we have the express provision of the constitutional convention that every ordinance of this convention *shall go into effect* from the date of its passage, unless such ordinance shall be required to be submitted to the people for ratification; also, that the printed copies of all the ordinances shall be admitted as evidence in all courts of this state. This ordinance was not required by the convention to be submitted to the people of the state for ratification. Only the constitution was so submitted to them.

On the next day, March 14, the convention passed an ordinance submitting the constitution to the voters of the state for ratification, such vote to be had on April 21, 22 and 23, 1868, and the constitution was afterwards ratified.

On this record of the constitutional convention of North Carolina there can be but one conclusion as respects the said ordinance incorporating the Northwestern North Carolina Railroad Company; namely, that the said ordinance was intended by the said convention to go into full force and effect, and to be the law governing the said railroad. As above stated, this ordinance has never been repealed, nor has the legislature attempted to repeal it; and, if it were necessary, we might maintain here that the legislature could not repeal it.

That it is competent to refer to the Journals of a constitutional convention to see how an enactment of such convention is built up, see *Matter of Woolsey*, 95 N. Y., 135; and see, also, *Marshall vs. National Bank*, 23 Wall., 307; and *Edger vs. Board of Commissioners*, 70 Ind., 358.

This ordinance, of March 9, 1868, as appears above, was held, in the two Forsyth county cases, to be full and sufficient authority, *per se*, for the issue of the bonds there in question. Precisely on the same grounds and principles it is full authority *per se*, for the issue of the Wilkes county bonds involved in the present case, the same having been duly sanctioned by the qualified votes of Wilkes County.

The Supreme Court of North Carolina, in the Recent Case of Commissioners of Wilkes County vs. Call, is Clearly in Error in its Consideration and Statements of the Hill and Belo Cases.

The Supreme Court of North Carolina, in *Commissioners vs. Call, 123 N. C., 308* (p. 317), 1898, undertakes to distinguish the case of *Belo vs. Commissioners*, 76 N. C., 289, by saying as follows:

"We have not overlooked the fact that in *Belo vs. Commissioners*, 76 N. C., 489, this court strongly intimates that Section 12 of the charter did confer the authority given in Section 33 of the act of 1852" [Section 2 of the ordinance of the constitutional convention gave the power, and Section 12 prescribed the manner of its exercise], "but it does so incidentally and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying act of 1868. This is clearly shown in the opinion itself, which devotes four pages to the discussion of equitable estoppel arising on the recitals, and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence, on page 497, that 'as the case is presented to us, that question does not arise, and we do not decide it.' It evidently did not receive careful investigation, as it apparently did not arise on the pleadings. The court stated that the 'principle of equitable estoppel is a most important element in the transaction,' and that the recitals in the bonds (which were essentially different from those now before us) constituted an estoppel in *pais* upon the county of Forsyth."

It cannot be possible that it is necessary to remind this Court that there cannot be any estoppel by recitals where there was absolutely no legislative authority for the issue of bonds. The whole discussion of the Supreme Court of North Carolina in *Belo vs. Commissioners*, which, as stated by the court in the

case of *Commissioners vs. Call*, occupied four pages, proceeded upon the only possible ground—namely, *that there was legislative authority* in the said Ordinance of 1868, but that perhaps that authority had not been strictly followed. The question which the court, on page 497, says "does not arise" is not what the Supreme Court of North Carolina, in the *Call case*, apparently means to give the impression that it is, but it is this question, stated in the very words of the opinion of the court in *Belo vs. Commissioners*, to wit:

"When the subscription was voted there is authority and reason for asserting that the Justices could have been compelled by process of law to make the subscription, unless in defense they could have shown that the election was not fairly conducted but was influenced by the fraud of the Railroad Company *(People v. Supervisors*, 27, Cal., 655*)*. As the case is presented to us, that question does not arise and we do not decide it."

On the question of whether there was power to issue the bonds, the Court said, distinctly, in *Belo vs. Commissioners:*

"The county was clothed with the power to issue them, and it is admitted that a majority vote sanctioned the subscription of stock and the issue of the bonds."

Again, the Court said:

"It has been one purpose of this opinion to show that the bonds were valid in the hands of bona fide holders without the aid of this healing act" [that is, the act of August 11, 1868], the only other authority being the said ordinance.

In connection with this case of *Commissioners of Wilkes Co. vs. Call*, 123 N. C., 308, 1898, we desire to call the attention of this Court to what is obviously an

error in the statement of facts in the dissenting opinion of Justice FURCHES. He says:

(p. 328) "On the *25th of March*, 1868, the county of Forsyth subscribed $100,000 to said corporation [Northwestern North Carolina Railroad Company], which subscription was held to be valid in *Hill vs. Commissioners*, 67 N. C., 367."

The date, March 25, 1868, is obviously an error. This error is quoted and repeated from time to time by the learned counsel Judge AVERY in his brief in the present case. It appears from the statements of fact made by the Supreme Court of North Carolina, in the Case of *Hill vs. Commissioners*, not that the bonds of Forsyth County were issued on March 25, 1868, but that on March 25, 1868, the justices made an order to submit the question of subscription to the qualified voters of the county, the vote to be taken on April 4, 1868. It also appears that the returns of the election were made to the June Term, 1868, of the County Court and that the said Court, at the June Term, ordered the subscription to be made *(supra*, pp. 20, 24*)*. It further appears from the official report of the case of *Belo vs. Commissioners of Forsyth County*, *supra*, that, of the said bonds, some, at least, were not sold until March 5, 1869, and that these bonds recited that they were "authorized by an ordinance of 1868, by an order of the Court of Pleas and Quarter Sessions of Forsyth County, at June Term, 1868, and re-enacted and ratified and confirmed by an Act of the General Assembly, ratified the 11th of August, 1868," *(supra*, p. 24*)*, so that the said bonds could not possibly have been issued before the 11th of August, 1868.

On this state of facts, the theory advanced by the

Supreme Court of North Carolina, in the case of *Commissioners vs. Call*, 123 N. C., 308, 1898—namely, that these two Forsyth County cases of *Hill vs. Commissioners*, and *Belo vs. Commissioners*, could have decided that the ordinance of 1868 gave power to issue the Forsyth County bonds, and yet, that, consistently with these two cases, the North Carolina Court, in this later Wilkes County case, could decide that the constitution of 1868, which was ratified by the people April 24, 1868, had wholly repealed the said ordinance of 1868, and that this later decision did not, in effect, overrule the two Forsyth County cases—upon this state of facts, we say, that theory is absurd, and is completely refuted by the chronology. If the constitution which went into effect *April 24, 1868*, completely repealed the ordinance of 1868 incorporating the Northwestern North Carolina Railroad Company as to the power of counties to issue bonds, then the Court ought not to have decided in 1870 and 1877, in the two Forsyth County cases, that the said ordinance gave power to issue the Forsyth County bonds there in question, for those bonds were issued long after April 24, 1868, and bear on their face evidence that *they were issued after August 11, 1868*, for they recite the act of that date, as above stated.

Power of Counties given by the ordinance of March 9, 1868, had not expired by limitation in 1889, when the bonds in suit were issued.

The Supreme Court of North Carolina, in the case of *Commissioners vs. Call*, 123 N. C., 308, 1898, refer to the fact that the charter of the North Carolina and Atlantic Railroad Company, or the Atlantic and North Carolina Railroad, Chapter 136 of the laws of 1852, provides, in Section 45, that "If the said road be not completed within six years after the ratification of this act, this charter shall be forfeited," and the court says: "Therefore, even if the powers granted in the act of 1852 had been given to the Northwestern North Carolina Railroad Company, or the counties in its interest, subject to the 'same restrictions,' those powers would have expired by their own limitation long before their attempted exercise twenty-three years thereafter." This language of the Supreme Court of North Carolina has no support in the ordinance of 1868 chartering the Northwestern North Carolina Railroad Com-Company, nor in the parts of the act of 1852 referred to in the said ordinance. Section 12 of the said ordinance provides "that all counties or towns *subscribing stock* to said company *shall do so in the same manner and under the same rules, regulations and restrictions* as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company" (Record, p. 27). This reference to the act of 1852 incorporating the North Carolina and Atlantic Railroad Company is made only so far as the said act of 1852 relates to the manner, rules, regulations and restrictions in *subscribing for stock*. It does not, by reference,

make the act of 1852 a part of the said ordinance, with respect to the corporate life and existence of the company, and the six years' provision in Section 45 of the act of 1852 has no application to the Northwestern North Carolina Railroad Company.

Furthermore, this question of the corporate existence of the company is a matter which is expressly covered by other provisions of the said ordinance of 1868. Section 1 of the charter expressly provides that the said company "shall have a corporate existence as a body politic *for the space of ninety-nine years*" (Record, p. 25), and nowhere in the said ordinance is there any provision for any earlier termination of its charter, or for any forfeiture for not constructing this road.

Moreover, the said ordinance expressly provides for and contemplates the construction of the Northwestern North Carolina Railroad *by divisions*, and not necessarily all at one time, and there is no forfeiture prescribed for failure to construct any one division, nor is there any forfeiture prescribed if the railroad company, after having constructed one division of the road, waits for a time before constructing another division.

Thus Section 5 of said ordinance (Record, p. 26) provides that the said company shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem, in Forsyth county, which portion of said railroad when completed shall constitute its first division. Here, then, is a provision that the said railroad shall be constructed "as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem," and that this portion of the railroad when completed shall constitute its

"*first division.*" No express provision is made in the act as to when any other division of the road is to be completed. Even this division to Winston and Salem is to be completed only "*as speedily as practicable,*" and no forfeiture is provided even if this provision is not complied with.

It appears from the two Forsyth county cases *(Hill* and *Belo Cases)*, above quoted, that immediately upon its incorporation, in 1868, the railroad company began to obtain funds with which to construct its railroad to the towns of Winston and Salem, in Forsyth county. This division of the railroad was constructed. Suppose that it had happened afterwards that no further railroad had been constructed. Said ordinance is wholly silent as to any forfeiture of the charter for not constructing additional railroad. If the ordinance had intended to provide for any such forfeiture, doubtless it would have provided what was to be done with the railroad already constructed, whether that railroad was to be operated by the Northwestern North Carolina Company Railroad, or whether it was to pass into the ownership of some other company.

The true view and the only view to be taken of this said ordinance on the point now under consideration, is that the Northwestern North Carolina Railroad Company might construct its road by sections or divisions from time to time, and that there was no forfeiture prescribed for any failure to complete the road to the terminus designated by Section 1, on the northwestern boundary line of the state of North Carolina.

In addition to the foregoing views, it is to be observed that if the Northwestern North Carolina Railroad Company was liable to have its charter forfeited for not exercising its franchise and constructing its

railroad to its whole extent, *this was a matter solely between the state and the railroad company*, and to be taken advantage of only by *quo warranto* proceedings. There is no suggestion in the record that any such proceedings have been had or attempted. So long as the state permitted the road to exercise the franchises and powers conferred by the said ordinance, and failed to exercise any right of forfeiture, if any existed, it is not open to any county which, under the powers given by the said ordinance, had subscribed stock and issued bonds in aid of the construction of the said railroad, to say that the said charter was liable to be forfeited, and, therefore, the county bonds were invalid. This is a matter with which the county has no concern. Especially has the county no concern in this matter, where the admitted fact is, as in the present case, that the railroad actually was constructed in the county of Wilkes and the county obtained all the consideration which was contemplated for the issue of these bonds.

The first question certified should be answered "No."

We therefore submit that clearly this Court should answer in the negative the first question certified to it by the United States Circuit Court of Appeals—namely, the question whether that court is bound in passing upon this case by the decisions of the Supreme Court of North Carolina in the case of *Commissioners vs. Call*, 123 N. C., 308, and the other cases cited in the question, "considered in connection with prior decisions of said court and the following provisions of the constitution of said state: Article II., sections 14

and 16; Article V., sections 1, 4, 6 and 7, and Article VII., section 7."

In addition to the foregoing there are certain other "prior decisions of said court" of North Carolina (referred to in POINT II., *infra*), under which the bonds in question in the present case are clearly valid, and for this reason also the said first question certified—namely, whether the Circuit Court of Appeals was bound by the decisions in the case of *Commissioners vs. Call*, 123 N. C., 308, and other cases decided after the issue of the bonds in question in the present case should be answered in the negative.

II.

Under the decisions of the Supreme Court of the State of North Carolina, as those decisions stood at the time when these bonds were issued, an ENROLLED STATUTE passed by the legislative assembly was conclusive, and a person consulting the laws of the state was not bound to examine the journals of the legislature and ascertain at his peril whether such acts had been passed in the manner prescribed by the constitution, and therefore the amendatory act of February 20th, 1879, printed in the record, page 29, signed by the proper officers, duly enrolled and published in the statutes was a valid act, and this act also, as well as the ordinance of 1868, gave lawful author-

ity to issue the bonds in question in the present case.

In *Brodnax vs. Groom*, 64 N. C., 244 (1870), the question came before the Supreme Court of the State of North Carolina whether the courts could go back of the enrolled act of the legislature and examine whether or not it had been properly passed by the legislature. It was objected (p. 245) that the said act was private, and was passed without the thirty days' notice of application required by the constitution, Article II., section 12. On this point the court (PEARSON, C. J., giving the opinion) said (p. 247) :

" We do not think it necessary to enter into the question whether this is a *public local* act or a mere *private* act, in regard to which thirty days' notice of the application must be given; for, taking it to be a mere private act, we are of opinion that the ratification certified by the lieutenant-governor and the speaker of the house of representatives makes it a 'matter of record' which cannot be impeached before the courts in a collateral way. Lord COKE says : 'A record until reversed importeth verity.'

" There can be no doubt that acts of the legislature, like judgments of courts, are matters of record, and the idea that the 'verity of the record' can be averred against in a collateral proceeding is opposed to all of the authorities. The courts must act on the maxim that '*omnia presumuntur*,' etc. Suppose an act of congress is returned by the president, with his objections, and the vice-president and the speaker of the house certified that it passed afterwards by the constitutional majority; is it open for the courts to go behind the record and hear proof to the contrary?"

In the case of *Gatlin vs. The Town of Tarboro*, 78 N. C., 119 (1878), the payment of a tax levied by the town of Tarboro was resisted on the ground (p. 120), that " the act is private, and having been passed without any notice of the application, as required by the

Constitution, Art. II., § 12, it is therefore void." The fact that no notice was given, such as the constitution requires, was admitted by the parties in their agreed case, but did not otherwise appear. On this point the court said (p. 123):

"*As to the second point*, if it appeared from the act itself, or affirmatively appeared by the journals of the legislature, which would have been competent evidence that the notice of the intended application for the act which the constitution requires had not been given, we should probably hold the act void. We have not consulted the journals. That was evidence to be offered in the court below. Probably they are silent as to the fact whether it appeared that the required notice had been given or not. In that case we think the presumption would be that the legislature had obeyed the constitution, and that it appeared to it that the notice had been given. '*Omnia præsumuntur rite esse acta.*' We cannot accept the agreement of the parties that no notice was in fact given as proof that it did not appear to the legislature that the required notice had been given. In such a case the best and only proof is by the record. Our opinion on this point is supported by a recent decision in Illinois. *Happel vs. Brethaner*, 70 Ill., 166.

"If any weight were allowed to admissions of this sort, the law might change as each case was presented. Our opinion on this point renders it unnecessary to determine whether the act was technically a public or private one."

The court therefore held the act good, notwithstanding the admission of the parties. What the court said it would "probably" hold in regard to the journals was clearly hypothetical and *obiter*, as no such question was presented before the court. This is called a *dictum* and expressly overruled in *Scarborough vs. Robinson*, *infra*, as being contrary to *Brodnax vs. Groom*.

In *Scarborough vs. Robinson*, 81 N. C., 409 (1879), the action was one of mandamus to compel the presid-

ing officers of the two branches of the legislative assembly to affix their signatures to an act of legislation which was shown by the journals to have been properly passed, but which had not been signed by such officers during the legislative session. The court held that the relator was not entitled to the mandamus, and that the action must be dismissed. In the course of the opinion the court said (p. 415) :

"The argument before us was mainly directed to the question whether an act of the general assembly clothed with the prescribed forms of law and placed in the keeping of the proper depositary, as such, can be impeached and its operation avoided by evidence derived from the journals or from other extraneous sources, that the directions of the constitution were disregarded or not observed in its progress and passage through the two houses ; and if this can be done, as a corollary or consequence, if the examination shows that all constitutional provisions have been strictly pursued up to and including the announcement of ratification, will not the court interpose and require the presiding officers to perform the omitted and mere ministerial act of authenticating the enactment with their signatures, and thus perfect in form what is already effective in substance.

"The discussion of the primary question upon the solution of which the other is supposed to be dependent, has been full, able and exhaustive ; and the numerous cases decided in the courts of different states before which the point was presented, brought to our attention through the industry and research of counsel, are by no means harmonious and consistent. If it were necessary in determining the present application to pass upon the competency of such impeaching evidence, we should be reluctant to assent to a proposition which leaves the existence and validity of a statute to depend upon the uncertain results of an inquiry made in each particular case, whether the provisions of the constitution directing the mode of legislative proceedings have been followed in the action of the two houses in passing a bill through its different stages of progress, when by the very act of authentication they declare that all these provisions have been

observed. If such an inquiry may be entered on (and it must be collaterally if at all, since there is no direct method of assailing and annulling a statute upon that ground) no lapse of time, no continuous and indefinite recognition of its force and acquiescence in its operation, and no non-interference by succeeding legislatures, would bar the inquiry or give stability and repose to the law itself; consequences so serious and far reaching cannot be hazarded except upon the clearest convictions of the soundness of the principle from which they flow, and the competency and duty of the court so to delare.

"In most of the cases to which we have been referred in which the competency of such evidence is maintained, the court pressed by the force of the objection avoid the consequences of its admission by holding that the requirements and restraints put upon the mode of legislative action, are only directory, and if disregarded do not affect the validity of the act done. This is but another method of reaching the same result. For why should an inquiry be prosecuted to ascertain a fact, which if disclosed by the journals is to have no effect?

"The distinction between the cases in which the judicial power will declare an act of the legislature void, and in which it will not, is forcibly pointed out in the case of the *Pacific R. R. Co. vs. Governor*, 23 Mo. (2 Jones), 353, by SCOTT, J., thus: 'While the power of the courts to declare a law unconstitutional is admitted on all hands as being necessary to preserve the constitution from violation, yet such power is claimed and exercised in relation laws which on their face show that the constitutional limits have been transcended.' * * * 'If the legislature exceeds its powers in the enactment of a law, the courts being sworn to support the constitution, must judge that law by the standard of the constitution and declare its validity. But the question whether a law on its face violates the constitution is very different from that growing out of the non-compliance with the forms required to be observed in its enactment. In the one case a power is exercised not delegated or which is prohibited, and the question of the validity of the law is determined from the language of it. In the other the law is not in its terms contrary to the constitution; on its face it is regular, but resort is had to something behind the law itself in order to ascertain whether the

general assembly in making the law was governed by the rules prescribed for its action by the constitution.'

"The question is thoroughly investigated and discussed in *Pangborn vs. Young*, 32 N. J. Law Rep., 29, which is followed by the supreme court of Nevada in *Nevada vs. Swift*, 10 Nev., 176, and all the authorities collected and reviewed. The Chief Justice thus announces the conclusion of the court in the former case: 'My general conclusion then is, that both upon the grounds of public policy and upon the ancient and well settled rules of law, the copy of a bill attested in the manner above mentioned and filed in the office of the secretary of state, is the *conclusive proof* of the enactment and contents of a statute of this state and that such attested copy cannot be '*contradicted by the legislative journals or in any other manner.*' And ELMER, J., concurring says: 'I am clearly of the opinion that we cannot look behind the law as it is signed and deposited among the public archives. It has thus become a record which cannot be contradicted.' The supreme court of Nevada, after a full examination of cases on each side of the question, sum up the result in the following words: 'From this discussion it appears that the decided weight of authority as well as every consideration of expediency is opposed to the doctrine that this or any court, for the purpose of informing itself of the existence or terms of a law, can look behind the enrolled act, certified by those officers who are charged by the constitution with the duty of certifying, and therefore, of course, with the duty of deciding what laws have been enacted.'

"If such force and effect are given to an enrolled bill bearing the impress of legislative sanction, and with the prescribed authentication of its proper officers deposited for safe keeping as prescribed by law, this authentication must be by the authority of the legislature itself, which can neither be coerced nor controlled by the judicial power.

The Court then proceeds to consider the Constitutional requirements in the passage of laws—the nature of an enrolled bill—defines what the "ratification" of a legislative act is, and the purpose and effect of the Art. 2, Sec. 23, requiring "all bills, before the

passage into laws, to be read three times and signed by the presiding officers of both houses":

"But the determination of the question is not necessary to a decision of the present application. In our opinion the signatures of the presiding officers of the two houses under and by force of the words used in our constitution are an essential prerequisite to the existence of the statute—the finishing and perfecting act of legislation—and must be affixed during the session of the general assembly.

"**An enrolled bill is not that considered and adopted by the concurring action of the two houses, but is a substituted copy transcribed to take the place of the original, and becomes the final expression of the legislative will. Its accuracy is secured by the examination, comparison and report of a committee in each house, and when each house ratifies that it accepts and adopts the enrolled bill as the embodiment of its own action and the correct expression of its will. Ratification is the act of the house, and its presiding officer in attesting the same acts on behalf of and by its authority. This is a necessary safeguard against fraud in the insertion of new matter, or the omission or change of existing provisions in the bill, not to be lost sight of or surrendered. Each body gives its direct and positive sanction to the enrolled bill, as its act, when its presiding officer signs, and he is but its agent acting in its stead when he does so. In other words, this is the consummation of legislative action, which is incomplete and inoperative without it. But the constitution in express terms makes the attestation imperative and essential. It declares 'that all bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws; and shall be signed by the presiding officers of both houses'** (Art. II., Sec. 23). * * *

"Our attention was called to the argument of plaintiff's counsel to an expression found in the opinion in *Gatlin vs. Tarboro*, 78 N. C., 119, in which RODMAN, J.,

says: 'If it appeared from the act itself or affirmatively appeared from the journals of the legislature, which would have been competent evidence, that notice of the intended application for the act *(private)*, which the constitution requires, had not been given, *we should probably hold the act void.*' Yet in this very case it was admitted that no such notice had been given, and hence there could be no issue and no controversy about the fact, and the admission was held insufficient to warrant the court in declaring the act void for the defect. The remark of the able judge was a *dictum* merely, in no manner necessary in the determination of the cause; and, if not an inadvertence, is clearly repugnant to what is declared by the Chief-Justice in *Brodnax vs. Groom*, 64 N. C., 244: 'We do not think it necessary,' say the court, 'to enter into the question whether this is a local public act or a mere private act, in regard to which thirty days' notice of the application must be given; for, taking it to be a mere private act, we are of opinion that the *ratification certified by the lieutenant governor and the speaker of the house of representatives makes it a matter of record which cannot be impeached before the courts in a collateral way.*' Lord COKE says 'a record until reversed importeth verity.'

"The constitution declares that the legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other (Art. I., Sec. 8). And if the nature and effect of an enrolled bill, duly certified and deposited in the proper office, be such as we have attributed to it, it unavoidably follows that the compulsory order demanded in the action would be an interference with the legitimate exercise of the law-making power and an obstruction to the harmonious working of the 'separate and distinct' co-ordinate departments of the government, and must consequently be denied."

In *State vs. Patterson*, 98 N. C., 660 (1887), it was held that a statute *without an enacting clause* prescribed by the constitution, Article II., Section 21, is void. The court cites *Scarborough vs. Robinson*, 81 N. C., 409, as holding that a bill without the signatures of the presiding officers of the two branches of the general assembly is void.

It seems perfectly clear that any lawyer reading these decisions of the Supreme Court of North Carolina, and the cases and authorities cited in such decisions, would come to the conclusion that the Supreme Court of North Carolina had established the rule that the enrolled act of the legislature, ratified by the legislature, properly signed by the presiding officers of the two branches of the legislature, is conclusive, and that it cannot be impeached by examining the journals, or in any other way.

This is the view taken by this Court in *Field vs. Clark*, 143 U. S., 649, 677, where this Court, after reviewing the cases which hold that the enrolled act is conclusive, says : **" To the same general effect are :** *Brodnax vs. Commissioners, 64 Nor. Car., 244, 248.*" * * *

This is also stated in the attorney-General's note to *Field vs. Clark*, 143 U. S., 649, 665, as follows :

" North Carolina.—In North Carolina it is held that the enrolled act is conclusive *(Brodnax vs. Groom*, 64 N. C., 344 ; *State ex rel. Scarborough vs. Robinson*, 81 N. C., 409*).*"

In *Ex parte Wren*, 63 Miss., 512 (1886), the Supreme Court of Mississippi, referring to the rule in North Carolina, says :

(p. 529 :) " A third view is that the enrolled act, signed by the president of the Senate and the speaker of the House of Representatives and the Governor, is the sole expositor of its contents and the conclusive evidence of its existence according to its purport, and that it is not allowable to look further to discover the history of the act or ascertain its provisions."

(p. 532 :) " The third view mentioned above meets our unqualified approval, because it is the simplest, the surest to avoid errors and difficulties, in accord with the constitution, and supported by an array of authority and a cogency of argument that commands our fullest

assent. Every other view subordinates the legislature and disregards that coequal position in our system of the three departments of government. If the validity of every act published as law is to be tested by examining its history as shown by the journals of the two houses of the legislature, there will be an amount of litigation, difficulty and painful uncertainty appalling in its contemplation and multiplying a hundredfold the alleged uncertainty of the law."

(p. 533 :) "**The rule which we announce as the correct one is supported by** * * * *Brodnax vs. Groom*, 64 N. C., 244."

Furthermore, that this understanding of these decisions of the Supreme Court of North Carolina, above quoted, is correct, appears, we submit, in the case of *Carr vs. Coke*, 116 N. C., 223 (February Term, 1899). Although this decision in *Carr vs. Coke* was rendered after the bonds in question in the present case were issued, yet it is competent to refer to that decision to show what the Supreme Court of North Carolina understood had been decided in the cases of *Brodnax vs. Groom* and other cases above cited, before the bonds in the present case were issued.

FAIRCLOTH, C. J., states the case as follows (p. 232) :

"The plaintiff, as a citizen and taxpayer of the State, brings this action against the defendant as Secretary of State, who, by virtue of his office, is the custodian of all Acts passed by the Legislature, or which purport to have been passed, whose duty it is to deliver certified copies of said Acts to the Public Printer for publication. The prayer is that the defendant show cause why a peremptory mandamus shall not issue to compel him to remove the act under consideration from his files, and why he should not be enjoined from delivering a certified copy of the same to the Public Printer. An act to regulate assignments and other conveyances of like nature in North Carolina, ratified March 13, 1895, is the one under consideration.

"The complaint alleges that the Act was signed by the President of the Senate and the Speaker of the House of Representatives on the said 13th of March in

the presence of each House, and purports to have been ratified upon that day; that, upon information and belief, the act did not become law according to the Constitution of the State. That the journals of both Houses show that it was not read three times in either; that it was never read in the Senate, and was tabled in the House on its second reading, and that by some unknown fraudulent means the bill was enrolled by some person unknown to the plaintiff, and signed by the said President and Speaker by mistake."

The court, in *Carr vs. Coke*, quoted the case of *Brodnax vs. Groom*, 64 N. C., 244, to the effect that (p. 235):

"We are of opinion that the ratification certified by the Lieut.-Governor and the Speaker of the House of Representatives makes it a 'matter of record,' which cannot be impeached before the Courts in a collateral way. Lord COKE says: 'A record until reversed importeth verity.' There can be no doubt that acts of the Legislature, like judgments of courts, are matters of record, and the idea that the verity of the record can be averred against in a collateral proceeding is opposed to all of the authorities. The courts must act on the maxim, '*Omnia presumuntur*,' &c. Suppose an Act of Congress is returned by the President with his objection, and the Vice-President and Speaker of the House certify that it passed afterwards by the Constitutional majority, is it open for the Courts to go behind the record and hear proof to the contrary?"

The court also said:

"In *Scarborough vs. Robinson*, 81 N. C., 409, in which this question was not directly before the Court, SMITH, C. J., in the discussion, uses this language on page 426: 'The Constitution declares that the legislative, executive and Supreme Judicial powers of the government ought to be forever separate and distinct from each other (Art. I., Sec. 8). And if the nature and effect of an enrolled bill, duly certified and deposited in the proper office, be such as we have attributed to it, it unavoidably follows that the compulsory order demanded in the action would be an interference with the legitimate exercise of the law-making power and an obstruction to the harmonious working of the separate

and distinct co-ordinate departments of the government, and must consequently be denied.' *We quote this extract in order to show the trend of the judicial mind of the Court as then constituted.*"

"The trend of the judicial mind of the Court as then constituted," as shown in *Brodnax vs. Groom* and in *Scarborough vs. Robinson*, would lead any lawyer to say that the court had expressly decided the legal proposition that covers this case—namely, that the enrolled act is conclusive.

The court, after considering the question, held, in *Carr vs. Coke*, as stated in the head-note of that case (p. 223):

"The courts cannot go behind such ratification to inquire whether it was fraudulently or erroneously enrolled before it had been passed, after the requisite readings by each house, although the journals do not show that it was so passed."

Note the ground upon which the Supreme Court of North Carolina decided, in the case of *Brodnax vs. Groom*, that the enrolled act was conclusive. The court did not rest its decision upon any such narrow ground as that the journals of the legislature or other matter besides the enrolled act might be examined for some purposes, but not for others, but the court rested its decision upon the broad, solid and comprehensive ground that the enrolled act, properly signed by the presiding officers of the legislative body was a matter of record which could not be impeached before the courts by reference to the journals of the legislature, or in any other way. That decision covers the Act of February 20, 1879, in question in the present case.

Re the Sufficiency of the Passage of the Amendatory Act of February 20, 1879.

The act of February 20th, 1879 (Record, p. 29) was read as shown by the Journals as prescribed by Sec. 2, Art. 14, of the constitution three several times in each House on three different days and the yeas and nays entered on the third reading in the House and on the second and third reading in the Senate, the Journal being silent as to the yeas and nays on the second reading in the House. This silence is the only alleged defect in the passage of this Act. And note that Sec. 5 enacts "This Act shall be in force from and after its ratification." Then follows these words: "Read three times in the General Assembly and ratified the 20th day of February, 1879."

This act thus read and ratified was thereupon signed in open session by the presiding officers of both Houses as required by Art. 2, Sec. 23 of the Constitution. Now, recalling the solemn nature of a ratification as described by the Supreme Court of North Carolina in *Scarborough vs. Robinson*, (quoted *supra*, p. 69), and that this is the express act of the legislative body giving its sanction to the enrolled bill thus ratified and signed; that such signing "is the consummation of legislative action" and a solemn record of it; that this act was put into immediate force on February 20, 1879; that it declares on its face that it was "read three times in the General Assembly" and then ratified; that the legislative journals long aftewards published show only a single omission to record the yeas and nays on the second reading in the House; that the act was duly printed

in the session laws of the State—recalling this, what is to be said of the late doctrine of the Supreme Court of the State first promulgated in the *Oxford* case (119 N. C. R., 214, 1896), that this act and this solemn record is liable to be impeached by the unpublished Journal made up in the haste and hurry of business from notes, and which is nowhere declared to be a record?

Even when tested by the Journals, the act of February 20, 1879, was passed in the full compliance with Art. 2 Sec. 14, except the omission to record, probably by mistake, the yeas and nays on the second reading in the House. Under these circumstances the courts should presume *(as such presumption in no way contradicts the Journals)* that the yeas and nays were in fact taken and by mistake omitted to be entered on the journal. Under the special circumstances thus attending the passage of this Act of February 20, 1879, as above shown, we insist *that the mere silence of the Journals will not impeach the act, even if the Journals are in any event competent for that purpose.* And we respectfully ask the judgment of this Court on the soundness of the proposition just stated.

But we nevertheless insist that under the doctrine announced by the court in the case of *Brodnax vs. Groom* this act not only is not but cannot be impeached by anything that appears upon the journals of the legislative body. Any one who at the time these bonds were issued, in 1889, examined the decisions of the Supreme Court of North Carolina, especially its decision in the case of *Brodnax vs. Groom* and other cases cited *supra*, would have been justified in coming to the conclusion that this enrolled and officially published act of February 20th, 1879, was conclusive,

and that he was not bound to consult the journals of the legislature to see that all the details in the passage of the act had been complied with.

This is the broad and underlying proposition announced by the court, on which the decision was rested in the case of *Brodnax vs. Groom*. The Supreme Court of North Carolina, in the recent case of *Commissioners vs. Call*, 123 N. C., 308, and other cases cited in the first question certified (Record, p. 42), decided since the bonds in question in the present case were issued, has undertaken to distinguish this case of *Brodnax vs. Groom*, and to say that on the particular facts in that case the Supreme Court of North Carolina *might* have decided that case on a narrower ground. That, even if true, is immaterial. The fact is that the court in *Brodnax vs. Groom did* decide the case on the single proposition that the enrolled act is a record and is conclusive, and this proposition, or rule of construction of the constitution, is one on which the holders of these bonds have a right to rely. To say that this proposition may now, after these bonds have been issued, be overruled by a process of distinguishing the case and saying that the court might have decided it upon other grounds, cannot be permitted. In the language of Mr. Justice BROWN, in the case of *Wade vs. Travis County*, 174 U. S., 499, this (p. 509) "would enable the state to set a trap for its creditors by inducing them to subscribe to bonds and then withdrawing their own security." If a construction of the constitution thus established by the decision of a state court could be frittered away and pared down as has been attempted by the Supreme Court of North Carolina, then no one could rely upon the opinions delivered by the court

and printed in their official reports, but it would be necessary in every case to examine the record and the particular facts in the case at length and in detail, and to ascertain whether or not the court *might* not have put its decision on some other ground than that actually stated in its opinion.

A striking illustration of the rule of judicial precedent as imperatively extending to cases which are held to fall within the *principle* of a previous decision, though the facts are different, is furnished by the case of *Lahr vs. Metropolitan Elevated Railway Company*, 104 N. Y., 268 (1887). RUGER, C. J., delivering the opinion of the court, which on this point was unanimous, said:

"The doctrine of the *Story case*, 90 N. Y., 122, therefore, although pronounced by a divided court, must be considered as *stare decisis* upon all questions involved therein, and as establishing the law as well for this court as for the people of the state whenever similar questions may be litigated. Wherever, therefore, the principles of that case logically lead us we feel constrained to go and give full effect to the rule therein stated, that abutters upon public streets in cities are entitled to such damages as they may have sustained by reason of a diversion of the street from the use for which it was originally taken, and its illegal appropriation to other and inconsistent uses."

III.

But even if it be contended by the attorneys for the county that the Supreme Court of North Carolina had not decided at the time these bonds were issued that an enrolled statute, passed by the legislative as-

sembly, duly ratified and signed, was conclusive, and that it was not competent to show by the journals that the statute had not been enacted in the manner prescribed by the constitution, then certainly the Supreme Court of North Carolina had not then decided against such a proposition. All of its language certainly, if not the several decisions of the court, was in favor of such a proposition. If, for the sake of the argument, we assume that the precise point involved in the present case had not been decided by the Supreme Court of North Carolina at the time when the bonds in suit were issued, then it is open to the federal courts to consider as a new and original proposition the following, namely, that " at the time these bonds were issued, by any sound principle of construction, an enrolled statute passed by the legislative assembly of North Carolina was conclusive, and it was not competent to ascertain from the journals whether such statute had been passed in the manner prescribed by the constitution."

On the point that under such a state of decisions this question is open in the federal courts, we need only refer to the leading case of *Burgess vs. Seligman*, 107 U. S., 20, quoted in *Folsom vs. Ninety-Six*, 159 U. S., 625 :

" So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, *or when there has been no decision of the state tribunals*, the Federal courts

properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."

Assuming, then, that the question is open for consideration in this Court as an original question, we maintain that, on sound principles of construction of the North Carolina constitution, an enrolled statute passed by the legislative assembly, ratified by it and duly signed by the presiding officers of each house, is conclusive and cannot be impeached by what appears, or does not appear, upon the journals of the legislature. On this proposition we cite the case of *Field vs. Clark*, 143 U. S., 649. The Court says (p. 672):

"The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries on its face a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated

in the manner stated, leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution.

"It is admitted that an enrolled act, thus authenticated, is sufficient evidence of itself—nothing to the contrary appearing upon its face—that it passed Congress. But the contention is that it cannot be regarded as a law of the United States if the journal or either house fails to show that it passed in the precise form in which it was signed by the presiding officers of the two houses, and approved by the President. It is said that, under any other view, it becomes possible for the Speaker of the House of Representatives and the President of the Senate to impose upon the people as a law a bill that was never passed by Congress. But this possibility is too remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy, to which the presiding officers, the committees on enrolled bills and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the Constitution. Judicial action based upon such a suggestion is forbidden by the respect due to a co-ordinate branch of the government. The evils that may result from the recognition of the principle that an enrolled act, in the custody of the Secretary of State, attested by the signatures of the presiding officers of the two houses of Congress, and the approval of the President, is conclusive evidence that it was passed by Congress, according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of Congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them.

"The views we have expressed are supported by numerous adjudications in this country, to some of which it is well to refer. In *Pangborn vs. Young*, 32 N. J. Law (3 Vroom) 29, 37, the question arose as to the relative value, as evidence of the passage of a bill, of the journals of the respective houses of the legislature and the enrolled act authenticated by the signatures of the speakers of the two houses and by the approval of the governor. The bill there in question, it was alleged, originated in the house and was amended in the Senate, but, as presented to and approved by

the governor, did not contain all the amendments made in the Senate."

The grounds and reasons of the rule that the Journals cannot control the enrolled record are thus forcibly stated by this Court:

"Referring to the provision in the constitution of New Jersey requiring each house of the legislature to keep a journal of its proceedings, which provision is in almost the same words as the above clause quoted from the Federal Constitution, the Court, speaking by Chief-Justice BEASLEY, said that it was impossible for the mind not to incline to the opinion that the framers of the Constitution, in exacting the keeping of the journals, did not design to create records that were to be the ultimate and conclusive evidence of the conformity of legislative action to the constitutional provisions relating to the enactment of laws. In the nature of things, it was observed, these journals must have been constructed out of loose and hasty memoranda made in the pressure of business and amid the distractions of a numerous assembly. The Chief-Justice said: 'Can any one deny that, if the laws of the State are to be tested by a comparison with these journals, so imperfect, so unauthenticated, that the stability of all written law will be shaken to its very foundation?"

What has happened in North Carolina since the decision was made in that State that the enrolled and published acts could be impeached by the Journals is proof of the correctness of the statement that the stability of all enrolled and published acts has been shaken to its very foundations. This Court then continues:

"Certainly no person can venture to say that many of our statutes, perhaps some of the oldest and most important, those which affect large classes of persons or on which great interests depend, will not be found defective, even in constitutional particulars, if judged by this criterion. * * * In addition to these considerations, in judging of consequences, we are to remember the danger

under the prevalence of such a doctrine to be apprehended from the intentional corruption of evidences of this character. It is scarcely too much to say that the legal existence of almost every legislative act would be at the mercy of all persons having access to these journals; for it is obvious that any law can be invalidated by the interpolation of a few lines or the obliteration of one name and the substitution of another in its stead. I cannot consent to expose the state legislation to the hazards of such probable error or facile fraud. The doctrine contended for on the part of the evidence has no foundation, in my estimation, on any considerations of public policy.' The conclusion was, that upon grounds of public policy, as well as upon the ancient and well settled rules of law, a copy of a bill bearing the signatures of the presiding officers of the two houses of the legislature and the approval of the governor, and found in the custody of the Secretary of State, was conclusive proof of the enactment and contents of a statute, and could not be contradicted by the legislative journals or in any other mode. These principles were affirmed by the New Jersey Court of Errors and Appeals in *Freeholders of Passaic vs. Stephenson*, 46 N. J. Law (17 Vroom), 173, 184, and in *Standard Underground Co. vs. Attorney-General*, 46 N. J. Eq. (1 Dickinson), 270, 276."

After citing other like decisions, this Court, in *Field vs. Clark*, *supra*, says (p. 677): "To the same general effect are *Brodnax vs. Commissioners*, 64 Nor. Car., 244, 248;" also citing other cases.

It seems impossible that on sound principles a court can arrive at any other conclusion than that the enrolled act is conclusive and cannot be impeached by the journals. As is stated in *Field vs. Clark*, quoted *supra*, these journals are kept by a subordinate officer. They are frequently made up of loose memoranda. They are not declared to be records. While they are printed after the legislative session, they are not in general circulation. It is not the common practice of lawyers to consult the journals of the legislature whenever they examine legislation. On

the contrary, it is the common practice of lawyers and of the courts, from time immemorial, to consult only the officially published statutes and the enrolled act.

The reasoning of the Court in the case of *ex parte Wren*, 63 Miss., 512 (1886), is so sound and conclusive upon the point here presented that we quote the following from its opinion:

(p. 529:) "A third view is that the enrolled act, signed by the president of the senate and the speaker of the House of Representatives and the Governor, is the sole expositor of its contents and the conclusive evidence of its existence according to its purport, and that it is not allowable to look further to discover the history of the act or ascertain its provisions."

(p. 532:) "The third view mentioned above meets our unqualified approval, because it is the simplest, the surest to avoid errors and difficulties, in accord with the constitution, and supported by an array of authority and a cogency of argument that commands our fullest assent. Every other view *subordinates* the legislature and disregards that coequal position in our system of the three departments of government."

The impractibility of the *present* North Carolina doctrine and the evils that result from it are thus depicted, and the woeful experience in North Carolina shows that the picture drawn by the Mississippi Court is not in the least overcolored. The Court thus continues:

"If the validity of every act published as law is to be tested by examining its history, as shown by the journals of the two houses of the legislature, there will be an amount of litigation, difficulty and painful uncertainty appalling in its contemplation and multiplying a hundred fold the alleged uncertainty of the law. Every suit before every court where the validity of a statute may be called in question as affecting the right of a litigant will be in the nature of an appeal or writ of error or bill of review for errors apparent on the face of the legislative records, and the journals must

be explored to determine if some contradiction does not exist between the journals and the bill signed by the presiding officers of the two houses. What is the law is to be declared by the court. It must inform itself as best it can what is the law. If it may go beyond the enrolled and signed bill and try its validity by the record contained in the journals, it must perform this task as often as called on, and every court must do it. A justice of the peace must do it, for he has as much right and is as much bound to preserve the constitution and declare and apply the law as any other court, and we will have the spectacle of examination of journals by justices of the peace and statutes delared to be not law as the result of their journalistic history, and the circuit and chancery courts will be constantly engaged in like manner, and this court will, on appeal, have often to try the correctness of the determination of the court below as to the conclusion to be drawn from the legislative journals on the inquiry as to the validity of statutes thus tested. It is difficult enough often to say what an admitted statute means, and while we would not shrink from the investigation of all questions of fact on the existence of which any statute depends, we decline to review the legislative records to try the regularity of its action as to the manner of exercising its constitutional authority to enact laws, over which its power is as plenary as that of this court as to the manner in which it shall exercise its jurisdiction.

"The rule which we announce as the correct one is supported by Sherman vs. Story, 30 California, 253; People vs. Burt, 43 California, 560; Evans vs. Browne, 30 Indiana, 514; Koehler vs. Hill, 60 Iowa, 543; Company vs. Richoux, 23 La. An., 743; Mayor vs. Harwood, 32 Md., 471; Railroad Co. vs. Governor, 23 Mo., 353; Swann vs. Buck, 40 Miss., 268; State vs. Swift, 10 Nevada, 176; Pangborn vs. Young, 32 N. J. Law, 29; People vs. Devlin, 33 N. Y., 269; **Brodnax vs. Groom,** 64 N. C., 244.

"There are other cases supporting the opposite views, but we have cited the most important on both sides.

"The English rule is conceded to be that for which we contend."

The rational and solid foundation of the rule that

the Journals cannot impeach the enrolled act duly signed and authenticated unless the Constitution so says in terms *(and the North Carolina Constitution does not)* is thus expounded in the most able opinion of the Supreme Court of Mississippi :

" The fundamental error of any view which permits an appeal to the journals to see if the constitution has been observed in the passage by both houses of their enactments, is the assumed right of the judicial department to revise and supervise the legislature as to the manner of its performance of its appointed constitutional functions. It is the admitted province of the courts to judge and declare if an act of the legislature violates the constitution, but this duty of the courts begins with the completed act of the legislature. It does not antedate it. The legislature is one of the three co-ordinate and coequal departments into which the powers of government are divided by the constitution, possessing all legislative power and not subject to supervision and control during its performance of its constitutional functions, nor to judicial revision afterward of the manner in which it obeyed the constitution its members are sworn to support. From necessity the judicial department must judge of the conformity of legislative acts to the constitution, but what are legislative acts must be determined by what are authenticated as such according to the constitution.

" That instrument contains many provisions as to the passage of bills which are admitted to be addressed to legislators exclusively, and for non-observance of which there is confessedly no remedy which courts can apply. Why should a distinction be drawn between the different provisions of the constitution, and some be held *mandatory* and others *directory?* There is no reason for such a distinction, and it is the off-spring of a necessity born of the error of regarding any of the provisions of the constitution addressed to and obligatory on the legislature as enforceable by the courts as supervisors of the legislature. The sound view and that which avoids the inconsistency of the distinction mentioned, is to regard all of the provisions of the constitution as mandatory, and those regulating the legislative department as addressed to and mandatory to that body, and with which the courts have nothing to

do in the way of revision of how the legislature has performed its duty in the matters confided exclusively to it by the constitution."

So the provisions of Art. 2, Sec. 14, show that they are rules of *procedure* addressed to the Legislative Department to be observed by that Department, and there is no declaration in that section or elsewhere that if they are not observed and their observance made to appear on the Journals the Act though ratified, signed, enrolled and officially published shall be void.

The Mississippi Court thus proceeds :

"Let the courts accept as statutes, duly enacted, such bills as are delivered by the legislature as their acts authenticated as such in the prescribed mode.

"The language of the constitution, Sec. 23, art. iv., is: 'Bills may originate in either house, * * * and every bill shall be read on three different days in each house, unless, etc., * * * and every bill, having passed both houses, shall be signed by the president of the senate and the speaker of the house of representatives in open session.'

"'SECTION 24. Every bill which has passed both houses shall be presented to the governor of the State.' Is it not manifest that the requirement that the bills which have passed both houses shall be signed by their presiding officers, in open session, was designed as an official attestation of the fact of such passage, and a solemn and unimpeachable authentication of the bills passed by both houses, an assurance of their identity and of the fact that they had been passed by both houses, in the manner required by the constitution? Thus attested, every bill is to be presented to the governor. Must he search the journals to guard against a disregard by the legislature of the constitution as to the manner of legislating, and to avoid giving approval to an act passed without a due observance by the legislature of its provisions?

"Is every person on whom the law operates to look beyond the enrolled act duly signed as required by the constitution, to see if the journal nullifies what appears by the act thus attested? The proposition is monstrous, and the recognition of such a doctrine is full of mischief, without any compensating advantage.

But, it is said, the courts are guardians of the constitution and if they do not look into the history of legislative doings that department may disregard the constitution as to the manner of passing laws. True, the courts are guardians of the constitution in the performance of their duty to decide causes, and should not shrink from declaring an act of the legislature enacted precisely in the mode prescribed by the constitution void if its provisions violate it; and, on the other hand, the courts should not arrogate the unconstitutional prerogative of reviewing and revising the course of legislative procedure in passing bills in the exercise of its clearly conferred right to pass them by virtue of an instrument containing injunctions binding on it, and sought to be enforced by the oath required of members, and not committed to the courts."

Numerous other authorities might be cited and quoted from to the same effect.

In short the enrolled bill, duly ratified in open session and "*signed by the presiding officers* of both Houses," as required by the Constitution of the State (Art. 2, Sec. 23) is the *record* prescribed by the Constitution itself and not the unattested Journals.

The decision of the Supreme Court of North Carolina, in the case of Gatlin vs. Tarboro, 78 N. C., 119 (rendered before these bonds were issued), that it would not take judicial notice of the journals of the legislature, is utterly inconsistent with any proposition that an enrolled act can be impeached by such journals.

Under familiar principles of common law the court is bound to take judicial notice of the law. Certainly a state court is bound to take judicial notice of the laws of the state. When, therefore, a state statute is before a state court, the court must, in the very nature of things, take judicial notice of whether that statute is

the law or not. If, in order to know whether that statute is the law, it is necessary to find upon the journals of the legislative body certain entries, and if without such entries the statute is no law, then by all the fundamental principles of law and logic the court must take judicial notice of all that appears upon the journals of the legislative body. The Supreme Court of North Carolina, however, in the case of *Gatlin vs. Tarboro*, 78 N. C., 119, expressly held that it would not take notice of such journals. This holding is wholly irreconcilable with the proposition that in order to know whether a statute is law one must consult the legislative journals.

The Supreme Court of the State of North Carolina, down to this present time, still holds that it will not take judicial notice of the legislative journals (*Union Bank vs. Commissioners of Oxford*, 116 N. C., 339, and 119 N. C., 214).

In other words, we have here presented this utterly inconsistent proposition now advanced by the Supreme Court of North Carolina, namely, that any person purchasing bonds issued by counties or other municipalities in the State of North Carolina must take notice of the law. In order to know what the law is, such person must consult the journals of the legislative bodies and see whether the duly enrolled and officially published laws have been passed in the precise manner prescribed to the legislature as a mode of procedure by the constitution. But when a case comes up in the courts of North Carolina, and it is necessary to determine what the law is, the courts themselves will take judicial notice only of the enrolled act, or the act as printed in the authorized published laws of the state.

Those courts will not take judicial notice of the journals, but they must be the subject of proof.

The earlier decisions, beginning with *Brodnax vs. Groom*, 64 N. C., 244, etc., all proceeded upon the correct doctrine, namely, that the enrolled act is the prescribed record, and the only record which either courts or individuals are obliged to consult, and the only thing of which they have constructive notice. The decisions of the Supreme Court of North Carolina rendered after these bonds were issued are to the effect that individuals must take notice of the journals, they being *a matter of law*, not a matter of fact, but with curious inconsistency they hold that the courts need not take judicial notice of these journals, but that they must be proved as other matters of fact, although the question before the court is, What is the law of the state—of which, on general and necessary principles, all courts are bound to take judicial notice without any proof whatever. Thus have the North Carolina courts departed from the early and the correct doctrine, but they have not been willing to adopt their new doctrine with its logical and necessary consequences, which would force the courts themselves and the judges of the courts, in every case tried by them involving the examination of a statute, to examine the journals of the legislative body to see whether the statute was properly passed.

Another way of putting the case is this: You, a purchaser of a negotiable municipal bond in the city of Washington, or New York, or Philadelphia, in examining that bond, are bound to examine not merely the statute under which the bond is issued, but you are bound to examine the legislative journals to see whether that statute was properly passed, because the

journals are part of the law, of which any one has constructive notice, but the North Carolina courts themselves will not pay any attention to the journals unless they are proved as a matter of evidence.

IV.

There was lawful authority for the issue of these bonds in the present case UNDER THE CODE, **sections 1996 to 2000 (Record, p. 28). These sections of the Code were originally adopted as the act of April 10, 1869. They were afterwards adopted as sections 1996 to 2000 of the Code of North Carolina of 1883. It is admitted by all that these sections of the Code, 1996 to 2000, were adopted in accordance with the constitution as respects the three several readings and the entry of yeas and nays upon the journal, etc.**

These sections of the Code are quoted at large in the Record on page 28.

Our first proposition under these sections of the Code is that they are prospective in their operation, and that they are not limited to any railroad which had been begun either before the constitution of 1868 was adopted or before the adoption of these sections of the Code by the act of April 10, 1869.

The language of section 1996 of the Code is: "The Board of Commissioners," etc., "*shall have* power to subscribe stock," etc., "to aid in the completion of any

railroad in which the citizens of the county *may have* an interest." *All this is future.* It applies to any railroad in which the citizens of the county may have an interest, either when the act was adopted *or at any time afterwards.* There is nothing in this language which restricts the operation of the act either to the time of the adoption of the constitution of 1868 or to April 10, 1869, the time of the first enactment of the statute which became these provisions of the Code. Any of the recent decisions of the Supreme Court of North Carolina to the contrary are wholly indefensible, and have no support in the language of these sections of the code. Inasmuch as all of these decisions were rendered after these bonds were issued, they are not binding upon the federal courts (See *Folsom vs. Ninety-Six*, 159 U. S., 61, *supra*).

These sections of the Code required an election and a vote of a majority of the qualified voters of the county in favor of the proposition of subscribing the stock and issuing the bonds. This provision was complied with in the case of this present issue of bonds. The bond (Record, p. 24) recites it. The complaint (Record, p. 6, paragraph 22) alleges compliance, and the answer of the county commissioners (Record, p. 15, paragraph 24) also admits compliance with this provision of the code.

The recital in the bond is that the bond is "authorized by a vote of the majority of the qualified voters of Wilkes county by an election regularly held for that purpose on the 6th day of November, A. D. 1888." We are aware of the fact which has been heretofore referred to in this brief, (*ante*, pp. 35–38) that the said bonds recite that they are issued by authority of the act of February

20, 1879. But the recital of the act (if that act of February 20, 1879, be held not to give authority) would not invalidate the bonds, if they were, in fact, authorized by some other act, as sections 1996 to 2000 of the Code, now under consideration. See *Anderson County vs. Beal*, 113 U. S., 227, where the wrong act was recited. In that case this Court, notwithstanding the bonds recite the wrong act, held, as respects the recital of the election, as follows, to wit (p. 239):

"In view of all this, the statement by the commissioners in the bond that it is issued 'in pursuance to the vote of the electors of Anderson county of September 13, 1869,' is equivalent to a statement that 'the vote' was a vote lawful and regular in form, and such as the law then in force required in respect to prior notice."

This recital, therefore, of the election in this Wilkes county bond is a recital of an election under sections 1996 to 2000 of the Code, and is conclusive in favor of the *bona fide* holders of these bonds, as was held in the said case of *Anderson County vs. Beal, supra.*

Sections 1996 to 2000 of the Code do not violate Article 5, Sections 6 and 7, of the Constitution as to "Special purpose," "Special object" or "Special approval" of the General Assembly.

Said Section 6 and 7, Article 5, of the Constitution are as follows:

SECTION 6. "The taxes levied by the Commissioners of the several counties for county purposes, shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

SECTION 7. "Every act of the General Assembly levying a tax, shall state the special object to which it is to be applied, and it shall be applied to no other purpose."

It was objected by the state court in the case of *Commissioners vs. Call, supra*, and in *Commissioners of Stanly County vs. Snuggs*, 121 N. C., 394, 400, 401, cited in the *Call Case*, p. 323, that these provisions of the Code are a general act, and as such violate Article V., Section 6 and 7, of the constitution, which provides, in substance, that taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner as the state tax, and shall never exceed the double of the state taxes, except for a special purpose, and with the special approval of the General Assembly, stating the special object to which the tax shall be applied.

(a) In the present case, however, there is not a word or a syllable in this record to show that the county tax necessary for these bonds would exceed double the state tax; therefore, the question does not arise.

(b) If, however, it had been shown in the record in this case that the county tax for these bonds might exceed double the state tax, then these bonds are, nevertheless, valid:

First, because the Code does not violate the provisions of Article V., Section 6 and 7, above referred to. The constitution only requires that the legislature give special approval to the special purpose for which any tax is levied in excess of the rate named, but such special approval may be given to all the counties, as well as to any one county, the object of the provision of the constitution being to require the special assent of the legislature to the special purpose. If the rate referred

to in Article V., Section 6, is to exceed the double of the state tax, this section requires the legislature to specify the special purpose for which it may so exceed the state tax. The legislature could not authorize such excess by an act, general or special, which only named county purposes generally, and did not specify the special or particular purpose, but it is not necessary that the legislature should in each instance specify by name any particular county or counties. The specification required is only a specification for a special purpose. Legislative authority to subscribe for the stock in a railroad company and issue bonds in payment of such subscription is a special purpose within the meaning of this section, and so the sections of the Code, 1996 to 2000, being the act of April 10, 1869, do specify the special purpose for which the tax is to be levied. It is not necessary to name by name each particular county. If these sections of the code had provided that the county commissioners of the county, A, B, C, D, etc., naming all the counties in the state, should have power to subscribe for stock in any railroad company, etc., obviously this would be good, for the very Section 6, Article V., of the constitution, referred to, contemplates that such taxes may be levied by all " the several counties " of the state. The constitution does not say that any special act is required, but only requires that the purpose be specified, and that the tax and the purpose have the special approval of the General Assembly.

The proposition of the Supreme Court of North Carolina on this point seems to be, in effect, that if the legislature passes a special act for each county in the state ; that is, say, ninety-five acts, each act exactly alike, except that one act applies to one county and

another to another, and so on through all the ninety-five acts, the legislation is good; but if the legislature, instead of doing this, enacts precisely the same act and says that this act shall apply to all counties in the state, then such an act is bad. Such a view is, of course, unsound, and, if that be the view of the state Supreme Court, the federal courts cannot be expected to follow it as to negotiable bonds issued before such state decision was made.

But, Second, however this point may be decided, a ruling one way or the other would not invalidate these bonds. A bond may be a valid obligation, although there is not sufficient tax to pay it.

Such bonds could be paid by as much tax as could be levied, and, if at any time the legislature did pass a special act giving its special approval to the levy of a further tax, then the defect of a lack of power to tax would be removed, if such defect existed. Therefore, on this point, the objection raised by the Supreme Court of North Carolina must fall. That there may be bonds which are valid, although there is a tax-rate limit, is well settled. See *United States vs. Macon County*, 99 U. S., 582. Article V., Section 6 of the constitution of North Carolina is a mere limitation upon the tax rate, such as was involved in this case of *United States vs. Macon County*, just cited.

Furthermore, Third, even if there be this tax-rate limit in Article V., Section 6 of the constitution of North Carolina, that is a mere limit. It does not appear as a matter of law on the face of the constitution, or on the face of these sections of the code, or on the face of these bonds, that in the instance of these particular bonds of Wilkes county the tax-rate limit would be exceeded. Whether or not this tax-rate limit would, as a

fact, be exceeded, is a matter in pais, of which the holder of a negotiable bond, like the bonds in question in the present case, is not bound to take notice. Moreover, as above stated, there is no proof in the present case that the county tax for these bonds would exceed double the state tax.

Erroneous Construction of the Word "Completion" in Section 1996 of the Code, by the Supreme Court of North Carolina in its Late Decision in the *Stanly County Case.* 121 N. C., 394. 1899.

The Supreme Court of North Carolina, at this late day, in *Commissioners of Stanly County vs. Snuggs*, 121 N. C., 394, has taken a very narrow view of the word "completion." It has undertaken to say that these sections of the Code refer only to a railroad which had been begun, and that the word "completion" is not synonymous with "construction," but that the language here requires that there must have been an unfinished road.

The court went further, and held that there must have been a road unfinished *at the time of the adoption of the constitution*, April 24, 1868, in order that these sections of the code might have application. This interpretation of the word "completion," we submit, is not the correct one.

It seems obvious that it is used as synonymous with the word "construction." This view is, we think, supported by the obvious difference between this language and the language used in the state constitution as respects the issue of state railroad aid bonds. Article V., Section 4, of the constitution prohibits the issue of State railroad aid bonds, "except to aid in the

completion of such railroads as may be *unfinished at the time of the adoption of this constitution.*" Section 1996 of the Code, adopted April 10, 1869, about one year after the framing of this provision of the state constitution, omits the significant words—namely, " unfinished at the time of the adoption of this constitution." On no possible theory can these words be read into the statute. The legislature did not put them there, and the courts cannot put them there.

Erroneous Construction in the *Stanly County Case* by the State Supreme Court of the Words " any Railroad in which the CITIZENS OF THE COUNTY MAY HAVE AN INTEREST," see said Section 1996 of the Code.

The Supreme Court of North Carolina held that the words of Section 1996 of the Code, " the citizens of the county may have an interest," do not mean exactly what they state, but hold that they require that the county, *as a county*, shall have a *pecuniary* interest in the railroad, in order that Section 1996 may apply to it. On this point it seems only necessary to state that no such words occur in Section 1996. This construction by the Supreme Court of North Carolina takes out the words " *the citizens* " and inserts the word " *pecuniary*," and thus it holds that the words " any railroad in which the citizens of the county may have an interest " are to be construed as follows, to wit : " Any railroad in which the county has a pecuniary interest." A mere statement of such a distorted construction of this language of the code is enough to refute any such construction. Here, too, again we may call the attention of this Court to the language of Article V., Section 6, of the constitution of the state of

North Carolina when it was dealing with the question of the right of the State to issue railroad aid bonds. There it refers to a railroad " in which the State has a *direct pecuniary interest.*" This section 1996 of the Code was adopted about one year after the said Article V., Section 6, of the constitution. Doubtless the legislators had before them this provision of the constitution, or, at least, were familiar with it. The difference in the language was obviously intentional and significant.

The history of the adoption of this provision of the State Constitution as to State Railroad Aid bonds shows that it had a different purpose from that of the Code (§§ 1996-2000).

What is now Section 5 of Article V. of the constitution was originally reported to the Constitutional Convention of 1868 by the committee on finance as follows:

" Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually " (Journal, p. 354).

An amendment was proposed as follows:

" And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads and other works of internal improvement as are unfinished, and in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon " (Journal, p. 354).

This proposed amendment was further amended as follows:

"Mr. Tourgee moved to amend by striking out 'are' in the fifth line and inserting 'may be;' insert after the word 'unfinished' in the fifth line '*at the time of the adoption of this constitution.*' Strike out 'and' in the fifth line and insert 'or.'" This amendment of Mr. Tourgee's was accepted, and the proposed amendment, as amended, was adopted (Journal, p. 354).

On pages 85 to 90 of the convention journal is a report made January 29th, 1868, by the Treasurer of the State to the President of the convention as follows:

"SIR—I have the honor, in response to the resolution of your honorable body requesting me to furnish the convention a 'statement of the indebtedness of the State, to what parties or sources, what amount to each, what is the amount of her endorsement for railroad or other improvements, what further endorsement of railroad bonds she is directed to make under any existing law or regulation, and, when passed, what property, or assets, or securities, said State holds for or on account of said indebtedness, what amount of stock the State holds in the several corporations of this State, and what amount of dividend or interest she receives annually from each source.'" * * *

The report of the Treasurer shows that, prior to the meeting of the convention, the State had undertaken to issue its bonds in aid of certain railroads, and that, under the statutes then existing, the State was liable to be called upon for the issue of additional bonds, or for the guaranty and payment of additional bonds, and the State owned stocks in certain railroads, thus having a direct pecuniary interest in them. The amendment made to Section 5, Article V., of the Constitution above quoted was designed to enable the State, *without a vote of the people*, to carry out its contracts already entered into on railroads, &c., already then begun and to protect its interests in the railroads, &c.,

already begun. *With a vote of the people* the State was allowed to aid railroads without restriction. As the Constitution, Article VII., Section 7, did not allow counties to incur any debt in any case (except for necessary expenses) without a vote of the people, the reason for the provision as to *unfinished* railroads in case of State aid, did not apply to counties, and was purposely omitted in the Act of April 10, 1869 (now Sections 1996–2000 of the Code).

This view is supported by the following decision rendered by the North Carolina Supreme Court in 1869, the year following the Constitutional Convention.

In *Galloway vs. Chatham Railroad Company*, 63 N. C., 147, the suit was to enjoin an issue of State bonds in aid of a railroad company. The court held that the bonds were unauthorized under the provisions of the constitution. In the course of the opinion (PEARSON, C. J., giving the same) the court say, with respect to the restrictions on the power of the state to incur debt, speaking of the debt existing at the time of the adoption of the constitution of 1868 (p. 153):

"It will be found that most of the public debt was incurred in three modes: 1st, by subscribing for stock in railroad and navigation companies, and issuing bonds to pay for the stock, the state becoming a member of the corporation; this is the heaviest item, and amounts to say eight millions of dollars; 2nd, by issuing bonds of the state and exchanging such bonds for a like amount of the bonds of the corporation, the state not becoming a stockholder and taking collateral security of more or less value; this is the next heaviest item, and amounts to about three millions of dollars; 3d, by endorsing the bonds of corporations and taking a mortgage or some other collateral security; this item amounts to about two millions.

These are the three modes by which, judging from the past, it was apprehended the public debt might be so run up as to ruin the credit of the state and tarnish her honor and her reputation for good faith.

" * * * (p. 155). The suggestion that the credit of the state was given by this statute to aid in the completion of an *unfinished railroad* was not strongly urged on the argument, and indeed it could not be. An unfinished road is one that has been begun and partly worked on, and such a road is made an exception, on the ground that it might be proper to finish it in order to prevent a sacrifice of the work that had been done. There is no evidence that such was the fact in regard to this road. The other suggestion, that the state has a direct pecuniary interest in this road, was properly abandoned. The word '*has*' is in the present tense. The exception is obviously confined to roads in which the state had a direct pecuniary interest at the time of the adoption of the constitution; otherwise the state might, by a subscription for stock, become directly interested in every railroad or navigation scheme that should thereafter be projected, and thus the restrictions of the constitution would be of no effect whatever."

Note the difference between the language of the Constitution as to State aid bonds and the language of the Code as to county aid bonds. The Constitution says "*has*," and note the comments of the court on the present tense. The Code says "*may have*," &c., &c.

Of course such of these decisions of the Supreme Court of North Carolina as were rendered after the bonds in question in the present case were issued are not binding upon this Court, and it is both the right and duty of this Court to construe this language of sections 1996–2000 according to their natural and proper meaning.

Within the meaning of Section 1996 of the Code the citizens of a county have an interest in any railroad running into or through the county, and this section would be confined accordingly to *such* railroads.

Our second proposition as to the Code is that even if the language of these sections of the Code—1996 to 2000—is to speak from the time of their earliest adoption—to wit, April 10, 1869—and if these sections are not prospective in their operation, they, nevertheless, authorize the issue of the bonds now in suit by Wilkes County, as they were issued in aid of a railroad which had been begun before April 10, 1869, and was then not completed.

There cannot be the slightest foundation in this language of section 1996 of the code for saying that it applies only to the completion of a railroad which had been begun *when the constitution of 1868 was adopted.* There is not a word or a syllable in the said provisions of the code lending any support to any such view. The utmost that could be claimed would be that these sections applied to the completion of a railroad which had been begun at the time these sections were adopted, which was in 1883, or, at the very earliest, April 10, 1869. Even if this earlier date, April 10, 18 9, be the one selected, then it is, nevertheless, true that these sections of the code would apply to and authorize these Wilkes county bonds, since this railroad might be a railroad referred to in these sections, and the sections might properly speak of the subscription to the stock of this railroad company as necessary to aid in the completion of this railroad. This company had been chartered by the ordinance of the Constitutional Convention, ratified March 9, 1868 (Record, p. 24), over one year before the passage of these code sections. Section 1 of the Ordinance of March 9, 1868, authorized the construction of the *main line* into Wilkes County. A glance at the map will show this. The line into Wilkes County was not a *branch* as erroneously contended in the brief of Judge AVERY (pp.

33, 34). Forsyth county, as shown in the two Forsyth county cases above quoted, had in 1868 issued bonds to aid in the construction of this road, such bonds being ordered issued at the June term, 1868, of the board of commissioners of Forsyth county. This railroad, then, was a railroad projected and begun and under construction at the time of the adoption of these sections of the code, April 10, 1869 (SEE MR. PRICE, BRIEF, p. 53, *for further facts and dates*). Obviously, therefore, these sections of the code apply to this issue of bonds by Wilkes county to aid " in the completion " of such railroad.

The County is Estopped by the Recital in the Bonds.

Inasmuch, however, as these sections of the Code—1996 to 2000—gave lawful authority to issue bonds to aid in the completion of a railroad, there was, under the familiar doctrine, *power to issue bonds ;* and whether or not all of the facts existed, such as that the railroad had been begun and was unfinished at the time of the adoption of this act, April 10, 1869, is a matter *in pais* to be determined by the county commissioners before the bonds are issued; and inasmuch as they have issued these negotiable bonds, and they are in the hands of *bona fide* holders, such holders are entitled to assume that they have been issued under and pursuant to the power which existed. This is under the familiar rule that, if upon any state of facts there was lawful authority to issue negotiable paper, then the holders of such negotiable paper are entitled to assume that such facts existed.

Second and Third Questions Certified by the Court.

The second and third questions certified by the Court are as follows (Record, p. 43):

"SECOND. Whether, if the bonds and coupons in question were issued, put in circulation and came to the hands of complainants, appellees, in due course of trade, for valuable consideration and without notice, and if there were at that time no decision of the supreme court of North Carolina adverse to these bonds or identical bonds issued under similar statutes, the bonds held by complainants are valid bonds.

"THIRD. Whether there was any decision adverse to the validity of these bonds or identical bonds or any construction of the constitution or law of North Carolina which affected the question of their validity when they came in due course of trade and for valuable consideration and without notice other than such notice as the parties are assumed to have of existing provisions in the constitution and statutes of the State of their invalidity."

Our argument, *supra*, under the first question certified by the Court, is equally applicable to the second and third questions certified, and we do not here repeat such argument at length, but respectfully refer the Court to the same. This argument shows conclusively that the *second* question ought to be answered in the affirmative; namely, that the bonds held by the complainants, *bona fide* holders thereof, are valid bonds.

Such argument also shows that the *third* question propounded should be answered by holding that there was no decision adverse to the validity of these bonds, but that there were decisions in favor of their validity.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
Of Counsel for W. N. Coler & Company.

APPENDIX.

Quoting or referring to provisions of Constitution, Ordinance of Constitutional Convention and Statutes of North Carolina to be considered in connection with this case.

1.

The following are provisions of the *Constitution* of North Carolina (See Code of North Carolina, 1883, Volume 2):

"ACTICLE II.

"LEGISLATIVE DEPARTMENT.

* * * * * *

SECTION 12. "The General Assembly shall not pass any private law, unless it shall be made to appear thirty days' notice of application to pass such a law shall have been given under such direction, and in such manner as shall be provided by law."

* * * * * *

SECTION 14. "No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly and passed three several readings, which readings shall have been on three different days and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal."

* * * * * *

"ARTICLE IV.

"JUDICIAL DEPARTMENT.

SECTION 19. "The laws of North Carolina, not repugnant to this constitution, or the constitution and laws of the United States, shall be in force until lawfully altered."

SECTION 16. "Each House shall keep a journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly."

* * * * * *

SECTION 21. "The style of the acts shall be: 'The General Assembly of North Carolina do enact.'"

* * * * * *

SECTION 23. "All bills and resolutions of a legislative nature shall be read three times in each House before they pass into laws, and shall be signed by the presiding officers of both Houses."

* * * * * *

ARTICLE V.

REVENUE AND TAXATION.

SECTION 1. "The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at three hundred dollars in cash. The Commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax combined shall never exceed two dollars on the head."

* * * * * *

SECTION 4. "Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

* * * * * *

SECTION 6. " The taxes levied by the Commissioners of the several counties for county purposes, shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

SECTION 7. " Every act of the General Assembly levying a tax, shall state the special object to which it is to be applied, and it shall be applied to no other purpose."

ARTICLE VII.

* * * * * *

SECTION 7. " No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

2.

Ordinance of Constitutional Convention, passed March 9, 1868, printed in full in Record, page 24.

3.

Chapter 136, Laws of North Carolina, Session of 1852, Sections 33 to 37, inclusive (being the act referred to in Section 12 of the said ordinance of March 9, 1868), printed in full in Record, page 31.

4.

Act of August 11, 1868, printed in full in Record, page 27.

(ART. VII.) SECTION 12. "All charters, ordinances and provisions relating to municipal corporations shall remain in force until legally changed, unless inconsistent with the provisions of this constitution."

5.

Act of February 20, 1879, printed in full in Record, page 29.

6.

Act of March 2, 1881, printed in full in Record, page 30.

7.

Code, sections 1996 to 2000, printed in full in Record, page 28.

Code sections 1996 to 2000 were originally the act of April 10, 1869, the title of which was, "An act to authorize the several counties of the State to take stock in railroad companies." Chapter 171, Public Laws, North Carolina, 1868–69. Ratified April 10, 1869. Public Laws, North Carolina, 1868–69, page 417. Re-enacted in Battle's Revisal, January 1, 1874; re-enacted in Code of North Carolina which went into effect November 1, 1883.

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JAMES H. McKENNEY,
Clerk.

No. 167.

No. 167 19398

Opp'r to Pet'n. of Dillon and others for Certiorari.

[The following is a full and exact report of the case of *Wilkes County vs. Call*, in the Supreme Court of the State of North Carolina, reprinted from the official report, 123 N. C., 308.]

Filed Oct. 15, 1900.

Commissioners of Wilkes County v. Clarence Call, Sheriff and ex officio Treasurer of Wilkes County, et als.

(Decided November 9, 1898.)
[123 North Carolina Reports, p. 308.]

COUNTY BONDS—RAILROAD STOCK—INVALIDITY—ESTOPPEL.

1. Legislation authorizing the creation of county indebtedness must conform to constitutional requirements.
2. A county bond stating on its face the Act under which it is issued is notice to the holder, and estops him from controverting the statement.

Civil action pending in Wilkes Superior Court and heard, by consent, before STARBUCK, *J.*, at Winston, upon a motion by defendants to vacate the restraining order, heretofore granted, until the final hearing.

The prayer of the complaint was to enjoin the defendant, County Treasurer of Wilkes, from paying the coupons on county bonds issued in aid of the Northwestern North Carolina Railroad Company on the ground that the bonds in controversy were issued by the Boad of Commissioners of Wilkes county, without lawful authority so to do, and are invalid and void.

His Honor refused the motion to vacate the restraining order, and defendants excepted and appealed.

The statement of the case fully appears in the opinion of the Court, and in the dissenting opinions.

Mr. A. C. Avery, for plaintiffs.

No counsel *contra*.

DOUGLAS, J.: This is an action brought to test the validity of certain bonds issued by Wilkes county in

payment of its subscription to the stock of the Northwestern North Carolina Railroad Company. The suit was brought by the Commissioners of the County of Wilkes against the County Treasurer. The defendants Turner and Wellborn, who had become the owners of one of the bonds after the bringing of this action, by leave of the court, became parties defendant, and invited all other bondholders to come in and join them in resisting the action.

In the face of each bond, dated October 1, 1889, appears the explicit statement that: "This bond is one of a series of one hundred bonds of the denomination of one thousand dollars each, issued by authority of an Act of the General Assembly of North Carolina, ratified the 20th day of February, A. D., 1879, entitled: 'An Act to amend the charter of the Northwestern North Carolina Railroad for the construction of a second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin Valley, by Wilkesboro, to Patterson's Factory, Caldwell county'," etc. The bond does not allude in any way to any other legislative act, nor does it profess to claim further validity than that derived from the recited act.

It is admitted, as well as clearly shown by the evidence, that this Act of February 20, 1879, was not passed in accordance with the mandatory provisions of the Constitution of this State, as construed by this Court inasmuch as upon the passage of said bill upon its second reading in the House of Representatives, there was no call of the ayes and noes, and further that the vote upon such reading was not recorded in the Journal of the House. Constitution, Article II, Section 14. The amendatory Act of 1881 is subject to the same objection. In view of the recent decisions of this Court it is useless to discuss this question now, as the rule has been definitely settled in the following cases: *Bank* v. *Commissioners of Oxford*, 119 N. C., 214; *Commissioners* v. *Snuggs*, 121 N. C., 394; *Charlotte* v. *Shepard*, 120 N. C., 411 and 122 N. C., 602; *Rodman* v. *Town of Washington*, 122 N. C., 39. Under the authority of these decisions we are compelled to hold that the entire issue of these bonds is null and void for want of legislative authority. An Act of the Legislature passed in violation of the Constitution of the State, or in disregard of its mandatory provisions, is to the extent of such repugnance, absolutely void; and all bonds issued thereunder bear the

brand of illegality stamped upon their face by the hand of the law.

The Act under which these bonds profess to have been issued was never legally passed and never became a law. As was said in *Norton v. Shelby County*, 118 U. S., 425, "An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

The Constitution of the State is plenary notice to the world of its organic law. There can be no *bona fide* holders of unconstitutional obligations, nor can ignorance of public statutes and legislative Journals be deemed otherwise than wilful or negligent. The Journals are published for the information of the public, and are widely distributed and easily accessible, fully as much so as the public records of a county. Surely no one would be heard to say that he was the *bona fide* owner of a piece of land simply because he held a deed therefor, when an inspection of the records would show that his grantor had no power to convey. It has been well said in *U. S. v. Macon County Court*, 99 U. S., 582, "The difficulty lies in the want of original power. While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfrequently been *gross carelessness* on the part of purchasers when investing in such securities. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound."

A careful distinction should be drawn between the want of power to issue bonds, and mere irregularities in the exercise of that power. The latter, under certain circumstances, may be cured by recitals, or eliminated by estoppel; but a want of power goes to the very root of the transaction, and destroys its vitality. A tree may yet live though its branches are badly shattered by the storm, but the last leaf falls when the root is dead.

This rule has been clearly laid down by the Supreme Court of the United States in the oft-cited case of *Anthony v. County of Jasper*, 101 U. S.. 693, where Chief Justice WHITE [*sic*] says: "Dealers in municipal bonds are charged with notice of the laws of the State

granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality, the *bona fide* holder is protected against mere irregularities in the manner of its execution, but if there is a want of power, no legal liability can be created. When the bonds now in question were put out the law required that to be valid they must be certified to by the Auditor of State. In other words, that officer was to certify them before their execution was complete, so as to bind the public for their payment. We had occasion to consider in *McGarrahan* v. *Mining Co.*, 96 U. S., 316, the effect of statutory requirements as to the form of the execution of patents to pass the title of lands out of the United States, and there say: "Each and every one of the integral parts of the execution is essential to the validity of a patent. They are of equal importance under the law, and one cannot be dispensed with more than another. *Neither is directory, but all are mandatory.* The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires.' The same rule applies here. The object to be accomplished is the complete execution of a valid instrument, such as the law authorizes public officers to put out and bind for the payment of money the public organization they represent."

By repeated adjudications this has become the settled rule of that court. *Police Jury* v. *Britton*, 82 U. S., 566, 570, 572; *Claiborne County* v. *Brooks*, 111 U. S., 400, 406; *Bank* v. *Porter Township*, 110 U. S., 608, 618; *Concord* v. *Robinson*, 121 U. S., 165, 167: *Kelley* v. *Milan*, 127 U. S., 139, 150; *Norton* v. *Dyersbury*, 127 U. S., 160, 175; *Young* v. *Clarendon Township*, 132 U. S., 340; *Hill* v. *Memphis*, 134 U. S., 198, 203; *Merrill* v. *Monticello*, 138 U. S., 673, 686, 687; *City of Brenham* v. *Bank*, 144 U. S., 173; *Savings Asso.* v. *Perry County*, 156 U. S., 692, 704.

But it is urged that while the bonds were expressly issued under the Act of 1879, there was, apparently unknown to both parties to the transaction, and certainly ignored by them, an existing authority to issue said bonds derived from an ordinance of the Constitutional Convention passed in 1868; and that therefore, we should hold that these bonds were unwittingly issued under that ordinance, and are therefore valid. The only authority we can find in that ordinance in any way authorizing the subscription to the stock of

the company or the issuing of the bonds, is as follows: "Section 2. That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties, in shares of one hundred dollars." "Section 12. Be it further ordained that the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the *same manner and under the same rules, regulations and restrictions* as are set forth and prescribed in the Act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company." That said ordinance cannot be relied on to support the validity of the bonds at issue is apparent for several reasons: First: We do not see that any authority whatever is given or attempted to be given by either of these sections, to Wilkes county to subscribe to the capital stock of this company. But it is said that section 12, by referring to the charter of the "North Carolina and Atlantic Railroad Company," by which we presume is meant The Atlantic & North Carolina Railroad, chapter 136 of the Laws of 1852, confers upon the different counties, through or near which the Northwestern North Carolina Railroad may run, the same authority to subscribe as was given to the counties tributary to the former company. Said section does not refer generally to the Act of 1852, nor does it profess to confer any of the powers therein granted. It simply says that those counties and towns that do subscribe "shall do so in the *same manner and under the same rules, regulations and restrictions*" as are prescribed in the former Act. The words, "same restrictions," are peculiarly significant here, as the Act of 1852, section 45, provides in express terms that "if the said road be not *completed* within six years after the ratification of this Act, *this charter shall be forfeited.* Therefore, even if the powers granted in the Act of 1852 had been given to the Northwestern North Carolina Railroad Company or the counties in its interest, subject to the "same restrictions," those powers would have expired by their own limitation long before their attempted exercise 23 years thereafter. As all such powers must be strictly construed, this restrictive provision must be

held to be in the nature of a limitation and not a condition subsequent. That is, the authority given to the counties to subscribe, if it ever existed, expired at the end of six years unless already exercised in such a way as to create vested rights. But it makes no difference how the power was exercised, if there was no power. Section 12 of the ordinance of 1868 does not refer to section 33 of the Act of 1852, which confers the power, but is evidently limited by its very terms to sections 34, 35 and 36, which prescribe the *manner* in which that power must be exercised by the counties or towns to which it may have been granted. It would have been very easy for the convention to have given the same authority granted in section 33, either in express terms or by reference to said section, but it has not done so and we cannot do so by judicial construction. There is no principle better settled than that all charters granting special privileges or powers must be not only strictly construed, but must be construed most strongly against the grantee. This rule with the reasons therefor has been so clearly stated by Chief Justice PEARSON in *Railroad* v. *Reid*, 64 N. C., 155, 158, that we can do no better than to quote his language, as follows: "It is equally well settled that contracts made by the State with individuals, in granting charters, are not to be construed by the same rule as contracts between individuals. In the latter case, the rules of common law, which is the same as common sense, is, 'words are to be taken in the strongest sense against the party using them', on the idea that the said interest induces a man to select words most favorable for himself. It is otherwise where the State is a party; for it is known that in obtaining charters, although the sovereign is presumed to use the words, in point of fact the bills are drafted by individuals seeking to procure the grant, and that 'the promoters', as they are styled in England, or the 'lobby-members', as they are styled on this side of the Atlantic, have the charters or acts of incorporation drafted to suit their own purposes; and a matter of this kind, instead of being in its strict sense a *contract*, is more like the act of an indulgent head of the family dispensing favors to its different members and yielding to importunity. So the courts, to save the old gentleman from being stripped of the very means of existence by sharp practice, have been forced to reverse the rule of construction, and to adopt the meaning most favor-

able to the grantor." The same rule is laid down in *Railroad Co.* v. *Canal Commissioners*, 21 Pa. St. Rep. 9, 22, where Chief Justice Jeremiah S. Black, says for the Court: "It may be that the privilege which the relators claim might arise by implication out of their charter or some other Acts cited by their counsel, if we were at liberty to give them the broad construction which we sometimes apply to other laws of a different character. But corporate powers can never be *created by implication nor extended by construction.* No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the legislature in a manner too plain to be misunderstood. When the State means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the powers which belong to her, it is so easy to say so that we will never believe it to be meant when it is not said; and words of equivocal import are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory, when they do find their way into the enactments of the Legislature. In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England. No other has ever received the sanction of any authority to which we owe much deference. This Court has asserted it times without number. We have ruled five or six important cases upon it within the last year. We seem not to have made much impression on the professional mind, and we are probably making as little now. But when respectable counsel call upon us hereafter (as they doubtless will) to enlarge corporate powers by construction, we can only repeat again and again that our duty imperatively forbids it. The privileges of the Pennsylvania Railroad Company may be too rigidly restricted. If the usefulness of the company would be increased by extending them, let the Legislature see to it. But let it be remembered that *nothing but plain English words will do it.*"

It should be borne in mind that there is no pretense of authority for the issue of these bonds outside of the charter of the North-Western North Carolina Railroad Company and its amendments. It has been the actor as well as the beneficiary throughout, and therefore

the Acts under consideration come peculiarly within the rule of strict construction laid down by the two great Chief Justices from whom we have quoted.

We have not overlooked the fact that in *Belo* v. *Commissioners*, 76 N. C., 489, this Court strongly intimates that section 12 of the charter did confer the authority given in section 33 of the Act of 1852; but it does so incidentally and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying Act of 1868. This is clearly shown in the opinion itself, which devotes four pages to the discussion of equitable estoppel arising on the recitals, and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence on page 497 that "as the case is presented to us, that question does not arise and we do *not* decide it." It evidently did not receive careful investigation, as it apparently did not arise on the pleadings. The Court stated that "the principle of equitable estoppel is a most important element in the transaction" and that the recitals in the bonds (which were essentially different from those now before us) constituted an estoppel in *pais* upon the County of Forsyth. Can it be questioned that estoppels must be mutual, and that he who relies upon the recitals in the bond to estop another must himself be bound by them? If this is so, it ends the case at bar, as all the recitals point to the unconstitutional Act of 1879. The case of *Hill* v. *Commissioners*, 67 N. C., 367, considering simply the power of the legislature to authorize the issue of bonds, has no bearing upon the present case. The Forsyth County bonds recited that *they* were "authorized by an ordinance of 1868, by an order of the Court of Pleas and Quarter Sessions of Forsyth County at June Term, 1868, and re-enacted and ratified and confirmed by an Act of the General Assembly ratified the 11th of August, 1868." The cases are clearly distinguishable. Another important point of difference is that the Forsyth County bonds were voted and subscribed within a few months after the passage of the ordinance, before whatever power it may have given, if any, had expired by its own limitation. It is evident that the legislature as well as the railroad company itself thought that the authority given in the ordinance was not sufficient, as in both cases additional legislation was sought and obtained. But

with this essential difference. In the case at bar, the amendatory act having been passed in violation of mandatory provisions of the Constitution, in legal contemplation, was never passed. As it has no legal existence, we have no authority to construe it, but simply to obliterate it. In *Jarratt* v. *Moberly*, 103 U. S., 580, 588, the Court in discussing a simular case says: "Further legislation was needed. Such was the evident opinion of the Legislature of the State, for by an additional Act, passed on the 29th March, 1872, the authority was given in terms." And on page 685 it says: "A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to to give it effective operation and suppress the mischief at which it was aimed."

SECONDLY: The bonds on their face profess to have been issued under an entirely differently [*sic*] statute.

The principle laid down by the Federal authorities, and practically of universal acceptance, is that estoppels rest upon the recitals in the bond. The rule is generally cited as laid down in *Town of Colonia* v. *Eaves*, 92 U. S., 484, as follows: "When legislative authority has been given to a municipality, or to its officers, to subscribe to the stock of a railroad company, and to issue municipal bonds, in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, *made in the bonds* issued by them and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality; *for the recital is itself a decision of the fact by the appointed tribunal.*" *Buchanan* v. *Litchfield*, 102 U. S., 278; *Bank* v. *Porter*, 110 U. S., 608, 616.

In the case at bar the bonds recite that they were issued under the Act of 1879; and as all estoppels of this nature to be operative must be mutual, are not the bondholders themselves estopped from setting up any facts to the contrary? These recitals point out the very Act under which the power is claimed, and it was the duty of all persons claiming thereunder to see that the Act met the constitutional requirements.

Certainly the estoppel can never go further than the recital itself. It cannot operate upon any other Act, nor as to the validity of any Act. In *Gilson v. Day-*

ton, 123 U. S., 59, it was held that "As it appears on the face of the bonds sued on in this action that they were issued under the special Act of February 18, 1857, which was held void in *Post* v. *Supervisors*, 105 U. S., 667, and not under the general law of March 6, 1867, the judgment dismissing the action is affirmed." As was said in *County of Davies* v. *Huidekoper*, 98 U. S., 98, 100, "There must indeed be power, which if formally and duly exercised, will bind the county or town. No *bona fides* can dispense with this, and no recital can excuse it." In *Dixon County* v. *Field*, 111 U. S., 83, 92, it was held that the estoppel arising from recitals, in the face of the bonds, never extended to or covered matters of law, and could arise only "upon matters of fact which the corporate officers had authority to determine and to certify."

THIRDLY: That ordinance did not create a contract between the railroad company and the county of Wilkes. The only contract that has ever existed between them was the contract of 1888, which was subject to all the constitutional provisions then existing. The mere authority given in the charter of a railroad company to receive subscriptions from municipal corporations, where no consideration is given and no attempted exercise of the power, has none of the essential elements of a contract, and is held at the pleasure of the law making power. Much more so is it subject to constitutional restrictions. *Town of Concord* v. *Bank*, 92 U. S., 625, 630; *Concord* v. *Robinson*, 121 U. S., 165, 169; *Loan Asso.* v. *Perry County*, 156 U. S., 692, 697. *Concord* v. *Bank*, *supra*, was overruled in *Fairfield* v. *Gallatin*, 100 U. S., 47, only in so far as it applied to the Constitution of Illinois, and for the only reason that the Supreme Court of the United States deemed it proper, in the construction of a State Constitution, to follow the State decisions instead of their own view of the law. The general principle remains unchanged, and meets our approval.

The ratification of the Constitution on the 24th day of April, 1868, when it went into effect for all domestic purposes, annulled all special powers remaining unexecuted and not granted in strict accordance with its requirements. Artile II, Section 14, is as follows: "No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of

the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal." Article VII, Section 7, is as follows: "No county, city, town or municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied, or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein."

The intention of the Constitution is obvious. Profiting by the sad experience of other States, it intended to restrict the granting of public aid, and to hold to the strictest accountability every member of the legislature who assisted in such grant by forcing him to twice record his vote on the Journal, where it would be open to public inspection. It further intended that every such grant should be the deliberate and intelligent Act of the Legislature itself as well as of the community affected thereby. It is our duty to give to these salutary provisions that just construction, required alike by the rules of law and of common sense, that will effectuate and not destroy their beneficial purpose. This view we think is sustained by the uniform decisions of the Supreme Court of the United States, the only tribunal before which this decision can ever lawfully come for review. In *Wadsworth* v. *Supervisors*, 102 U. S., 534, 537 (citing and reaffirming *Aspinwall* v. *Commissioners of Davies County*, 22 How. 364) the Court says: "We held in that case that the popular vote did not itself create a vested right in the railroad company to the bonds, and that a subscription was necessary to create a contract binding the county to issue bonds in payment of the stock, and binding the company to receive stock for the bonds. 'Until the subscription is made,' said Mr. Justice NELSON, speaking for the whole court, 'the contract is unexecuted and obligatory on neither party.' Hence the new State Constitution was held to govern the case, and from the time of its adoption to have withdrawn from the county commissioners all authority to make subscriptions to the stock of incorporated companies, except in the manner and

under the circumstances prescribed in that instrument." In *Norton* v. *Brownsville*, 129 U. S., 479, 490, Chief Justice FULLER, speaking for the entire Court, says: "These cases (referring to *Concord* v. *Savings Bank*, 92 U. S., 625, *Falconer* v. *Railroad*, 69 N. Y., 491; *Railroad* v. *Falconer*, 103 U. S., 821; *Wadsworth* v. *Supervisors*, 102 U. S., 534, and *Aspinwall* v. *Commissioners*, 22 Howard, 364) sufficiently illustrate the distinction between the operation of a constitutional limitation upon the power of the Legislature and a constitutional inhibition upon the municipality itself. In the former case, past legislative action is not necessarily effective [quoted *sic*], while in the latter it is annulled. Of course if an entirely new organic law is adopted, provision in the schedule or some other part of the instrument must be made for keeping in force all laws not inconsistent therewith, and this was furnished in this instance by the first Section of Article II, but such a provision does not perpetuate any previous law, enabling a municipality to do that which it is subsequently forbidden to do by the Constitution. The inhibition being *self-executing* and operating directly on the municipality, and not in itself enabling the latter to proceed in accordance with the rule prescribed, *further legislation is necessary before the municipality can act.*" In the late case of *Railway* v. *Texas*, 170 U. S., 226, it is held that "a clause in a charter of a railroad company granting it power to consolidate with or become the owner of other railroads, is *not* such a vested right that cannot be rendered inoperative by subsequent legislation passed before the company avails itself of the power thus granted." It is useless to cite the cases themselves cited in the cases referred to herein.

It is further urged on the part of the defendants and those whom they represent, that the issuing of these bonds was authorized by Sections 1996 to 2000 of *The Code*. This question was definitely settled in *Commissioners* v. *Snuggs*, 121 N. C., 394, 400, 401, and we see no reason to reverse our ruling, nor do we find any facts taking this case from its operation. We can add nothing on this point to what was therein so fully and ably said in the opinion of the Court, except to say that if the construction contended for by the defendants must be placed upon those sections, then they are in direct violation of the letter and spirit of the Constitution, inasmuch as they

practically annul one of its essential provisions. If the word "uncompleted" can refer to any road not yet begun, and the word "interest" apply to a mere friendly feeling or supposed advantage to be derived from the general building up of the country, then the several counties may go on forever subscribing unlimited amounts to any railroad *in esse* or *in futuro* that may be located within the range of their knowledge. Such a construction would simply nullify the Constitution by making its explicit restrictions vain and worthless. It cannot be adopted by us, but, if we were forced to adopt it, we would be equally forced to declare those sections null and void. If they mean that, they have no place upon the statute books. While the Legislature may, in individual cases, grant to specific counties the necessary authority in accordance with the provisions of the Constitution and subject to its restrictions, it cannot, by a sweeping Act of unlimited application, utterly destroy its operation. If the Legislature or the railroad company or the county had placed any such construction on those Sections, additional legislation would have been deemed useless, and the recitals in the bonds would have been different. It is true that this road had been begun and was in one sense uncompleted when the subscription was made, but it was *not* begun when the Constitution was ratified, and the county at that time had no pecuniary interest in it, nor any interest contemplated by the Statute.

It is not necessary for us to consider the fact that the first section of the road had been completed to Winston, beyond which all idea of extension seems for years to have been abandoned. The Act of 1881 has no reference to the bonds in question and is subject to the same objections as the Act of 1879, which we have been discussing.

We have given this case the most thorough investigation and careful consideration on account of the important principles and the large amount involved. We deeply deplore the fact that many parties must suffer, who are in morals, if not in law, innocent holders of the bonds, but their loss comes from their misplaced confidence in those from whom they received the bonds, and the negligence of the corporation to which the power was professedly given and the bonds were issued. The only authority for their issue is found in a railroad charter, and we cannot undertake to validate

defective or unconstitutional legislation by judicial construction. The suggestion of repudiation, so strongly urged here and elsewhere, has no weight with us. The so-called repudiation of an unconstitutional obligation is a contradiction in terms, and its assertion amounts simply to a moral and legal absurdity.

It has been said that the usual difference between heterodoxy and orthodoxy is the difference between your doxy and my doxy, and that in financial ethics the same distinction exists between stealing and financiering. This distinction we cannot endorse. It is just as wrong to wring from an unwilling and perhaps a suffering debtor an unjust debt, as it is to deprive a creditor of a just debt. We will try to do neither, but will hew to the line. The strictly moral aspect of the case is not before us, but it is possible that the plaintiffs, representing an honest, industrious and intelligent people may have reasons for their action as strong in morals as in law.

Enough appears to indicate, what is common knowledge, that the stock for which these bonds were issued has been swept away in the maelstrom of corporate reorganization. It may be that the plaintiffs, deprived of every vestige of consideration by the decree of a court of equity, may not feel any moral obligation beyond the strict letter of the law. They may see no difference between repudiation and reorganization when both accomplish the same result, to retain the benefit and shift the burden.

In *Lewis* v. *Pina County*, 155 U. S., 54, 58, it was held that bonds issued under an Act of the Legislature of the Territory of Arizona, which was in violation of the Revised Statutes of the United States, were *void*, and "*created no obligation against the County which a court of law can enforce.*" In the carefully considered case of *Brenham* v. *Bank*, 144 U. S., 173, 182, 188, the court says: "It is easy for the Legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds; and, under the *well-settled rule that any doubt as to the existence of such power ought to be determined against its existence*, it ought not to be held to exist in the present case. * * * As there was no authority to issue the bonds, even a *bona fide* holder of them cannot have a right to recover upon them or their coupons." Citing *Marsh v. Fulton County*, 10 Wall. 676, *East Oakland v. Skinner*, 94 U. S., 255; *Buchanan v.*

Litchfield, 102 U. S., 278 ; *Hayes v. Holly Springs*, 114 U. S., 120 ; *Davies County v. Dickinson*, 117 U. S., 657 ; *Hopper v. Covington*, 118 U. S., 148, 151 ; *Merrill v. Monticello*, 138 U. S., 673, 681, 682.

It has been suggested that the defence in this case has been only colorable, as but one of the bonds was represented. Under the circumstances we think that was sufficient. An elaborate answer, evidently prepared by able counsel, has been filed, presenting every reasonable defence ; and while no argument was made before us for the defendants, every phase of the case has been carefully examined by us in the five months during which we have held it under advisement. The plaintiffs had no means of knowing who held the bonds, as they are payable to bearer and pass from hand to hand without endorsement or registration. The bondholders themselves could have become parties at any stage of the proceedings, and would have been gladly heard by us ; but the mere fact that they deliberately refrained from any participation in the defence when they had every opportunity of doing so, should not deprive the plaintiffs of all power to protect the rights of the people they represent in a court of competent jurisdiction, where alone this action could be brought by them.

The current of authority from other States sustains the conclusions we have reached in this case, but owing to the large number of cases, we have thought it best to cite only from our own decisions and those of the Supreme Court of the United States.

For the reasons stated in this opinion, the judgment of the Court below is affirmed.

Affirmed.

FURCHES, J. (dissenting). On the 9th of March, 1868, the constitutional convention of North Carolina passed an ordinance chartering and authorizing the formation of a corporation, to be known as the 'Northwestern North Carolina Railroad Company.' Under this charter said company was formed and organized; and on the 25th of March, 1868, the county of Forsyth subscribed $100,000 to said corporation, which subscription was held to be valid in *Hill v. Commissioners*, 67 N. C. 367. In payment of this subscription, the county of Forsyth issued coupon bonds to the amount of $100,000, and they were held to be valid against the county in *Belo v. Commissioners*, 76 N. C. 489, and the work of constructing said road between Greensboro, in

the county of Guilford, and Winston, in the county of Forsyth, was commenced. This part of the road was completed and put into operation within the next few years, and has continued to be run and operated ever since. This charter made Winston a point to which the road should run, west of its starting point on the North Carolina Railroad. From this point (Winston) it was authorized to build branch roads, but none were built until 1887, when the company proposed to build a branch of its road from Winston to or near Wilkesboro, in Wilkes county, provided Wilkes county would make a subscription of $100,000 to the capital stock of said company. This proposition to subscribe $100,000 to the capital stock was submitted to the qualified voters of said county, by the commissioners thereof; the vote taken; a majority of the whole qualified voters of said county voted for the subscription. The subscription was made, and the road built to Wilkesboro, in compliance with the agreement of the railroad company; and the bonds now asked to be declared invalid were issued by the county, delivered to the railrord company, and the interest thereon regularly paid until the commencement of this action. All these facts are shown by the record, and are admitted to be true. But there having been a change in the personnel of the board of commissioners since said bonds were issued, and since said road was built, this new board is seeking in this action to repudiate the action of the former board.

I understand the court to rest its opinion on two grounds,—the want of power in the commissioners to submit the proposition to the voters, and to issue the bonds; and the doctrine of estoppel. If there is error in these positions, I shall contend that the conclusion to which the court has arrived is erroneous, and should be reversed. I admit that, if the commissioners had no legislative authority to submit the proposition of subscription to the voters of Wilkes, that these bonds are void and the judgment of the court is correct. But I propose to show that they had this authority, and that the bonds are valid.

The charter (the ordinance of the convention) in express terms makes the charter of the Atlantic & North Carolina Railroad Company a part of the charter of the Northwestern North Carolina Railroad Company, so far as it relates to the subscription of counties

to the capital stock of the company. This being so, the charter of the Atlantic & North Carolina Railroad Company is to be read and considered as a part of the charter of the Northwestern North Carolina Railroad Company. *Range Co. v. Carver*, 118 N. C. 328; *Commissioners v. Higginsbothern*, 17 Kan. 62. It is like an instrument referring to another instrument *(Flaum v. Wallace*, 103 N. C. 296*)*, or where the complaint in one action refers to the complaint in another action for data *(Alexander v. Norwood*, 118 N. C. 381*)*; they are to be read and considered together as one instrument. I have shown that the subscription made to this company (the Northwestern North Carolina Railroad Company) by the county of Forsyth, under the charter as originally passed, has been sustained, and held to be valid by this court in *Hill v. Commissioners, supra*. This decision established the power—the authority—to submit the proposition of subscription to the voters of the county, and to issue bonds. But the validity of the bonds issued on this subscription of Forsyth was again put directly in issue in the case of *Belo v. Commissioners of Forsyth*, in a mandamus proceeding, to compel their payment, and their legality was again sustained by this Court. *Belo v. Commissioners*, 76 N. C. 489. This case, also, as I contend, established the authority to submit the question to the voters, and to issue these bonds. It is true that the submission of this question in Forsyth was made by the justices of the peace, acting as a county court; and it is true that the charter provides that the question should be submitted by them. But this charter was passed, and this submission was made, and bonds issued, before the adoption of the constitution of 1868, which did not go into effect until the 22nd of April of that year. By this constitution and subsequent legislation, the county court was abolished, and the county commissioners succeeded to their powers in this matter, and in all such cases. It is so held by this court in *Belo v. Commissioners, supra*, and it is expressly so provided by the legislature. Section 1997 of *The Code*.

Therefore, while the submission of the question in Wilkes was by the commissioners, they were the successors of the justices and the county court, fully and clearly authorized to make the submission and the subscription and to issue the bonds.

But it is contended by the court that, if the charter authorized this subscription and the issue of the bonds now sought to be repudiated, that it was passed before the constitution of 1868 went into effect, and that it was thereby repealed. To support this position, *Aspinwall v. Commissioners of Davies County*, 22 How. 364, and *Lewis v. Pina County*, 155 U. S. 54, are cited by the court. Neither of these cases, in my opinion, sustain the position for which they are cited. The first case cited (22 Howard) is intended to raise the question of violating a contract under the constitution of the United States, and nothing more. The submission in that case was made, and the vote thereon was had, in 1849; but the subscription to the capital stock was not made, and the bonds were not issued, until 1852. In the meantime the constitution of the state (Indiana) had been amended so as to prohibit any county in the state from issuing such bonds. But Davies county proceeded to issue the bonds under said submission and vote, and to put them on the market, but afterwards refused to pay them; and the plaintiff, being the holder of a part of these bonds, undertook to enforce their payment. There was no question made in that case but what the constitution had inhibited their issue. But the plaintiff claimed that the submission and the vote thereon, which were before the amended constitution, amounted to a contract; and that the new constitution, which prohibited the county from issuing the bonds, was an impairment of the obligation of this contract, and therefore in violation of the constitution of the United States. No such question as this arises in this case. There is no pretense that these bonds are protected by any provision of the constitution of the United States.

But it is denied by the defendants that the constitution of 1868 repealed the charter of this road, or that it prohibited Wilkes county from making this subscription or issuing these bonds, as I expect to show. The case of *Lewis v. Pina County* arose out of the legislation of Arizona territory. The legislature of this territory passed an act authorizing Pina county to issue bonds for the construction of a railroad. This being a territorial government, it had no legislative powers except those granted by congress. And it was held in that case that congress had not only failed to grant such legislative

power, but had in express terms prohibited its exercise, and the bonds were held to be void. I fail to see the argument to be drawn from this case against the validity of the bonds under consideration. As has been stated, the charter of the Northwestern North Carolina Railroad was passed before the adoption of the constitution of 1868, which took effect on the 22d of April of that year. But the legislature passed an act, ratified on the 11th of August, 1868, as follows: 'Section 1. The general assembly of North Carolina do enact, that an ordinance entitled 'An ordinance to incorporate the Northwestern North Carolina Railroad Company,' ratified the 9th day of March, A. D. 1868, be and the same is hereby re-enacted, ratified and confirmed.' If there had been a repeal of this charter by the constitution, which I contend there had not been, it seems to have been re-enacted in August, 1868.

It has not escaped my attention that there is in the printed record an agreement as to what acts are to be considered by the court in deciding this case, and the act of 1868 is not one of those named. This agreement is signed by the counsel for plaintiffs, and by counsel for Mr. Turner and Mr. Wellborn, but it is not signed by any one for the defendant Call. But, if it had been signed by Call, I would have to disregard it. Parties may agree upon facts, that I would feel bound by, but I cannot feel bound by an agreement as to what is the law. I refer to this act of 1868 for the purpose of meeting an argument in the opinion of the court, and not for the reason that I consider it necessary to sustain the position I have taken, as to the authority of the commissioners of Wilkes county to submit this question to the voters, and to subscribe the stock, and to issue the bonds. The charter provides for submitting the question to a vote of the people in almost, if not, the language of the constitution of 1868, with the single exception that it shall be sufficient if a majority of the qualified voters 'voting thereon shall be in favor of the subscription.' To this extent, and no further, did the constitution of 1868 conflict with the provisions of this charter; and this was cured by section 1997 of the Code, which was admitted to have been passed as the constitution requires, and which provides that it shall take a majority of the qualified voters of the county to authorize the subscription, as was done in this case. Suppose that section 1997 of the Code had been passed

by the legislature, as an amendment to this charter, with all the formalities and requirements of the constitution; would it be contended that the submission was without legislative authority, and that these bonds were void? And, if not, why is it that a general law, applying to all cases of submission, has not the same effect?

The next ground upon which the court rests its opinion is that of estoppel. This ground of alleged invalidity to the bonds arises in this way: The legislature, at its February session (1879), attempted to pass, and did pass, an act providing for the extension of the Northwestern North Carolina Railroad, from Winston to Wilkesboro, for the subscription of counties to its capital stock, and the issue of bonds. But it is claimed by the plaintiff, and such appears to be the fact, that this act did not receive the three several readings, on three several days, with a call of the yeas and noes, as provided by the constitution, and, for that reason, that the said act is void, under *Bank v. Commissioners*, 119 N. C. 214, and *Commissioners v. Snuggs*, 121 N. C. 400. But the commissioners, when they issued these bonds, did not know that this act was unconstitutional and void, and they recited in the bonds that they were issued under the act of 1879. This act does not purport to be an original act, but it is stated in the act itself that it is an amendment to the ordinance of the convention chartering said road. So that any one seeing these bonds would be led by the statements therein to know that they depended upon authority derived from the original charter; that is, the ordinance of the convention of 1868. And it is claimed in the opinion of the court that this recital in the bonds, put there by the plaintiffs, estops the holders and those representing them from showing any other authority in the commissioners, except the act of the 20th of February, 1879, and that act being void for the reasons heretofore stated, the commissioners had no power to issue the bonds. I admit that this act is a nullity, and cannot benefit the bondholders; and as it is void, and can do them no good, it can do them no harm. The court therefore, upon this recital in the bonds that they were issued under the act of February 20, 1879, again rests its judgment upon the doctrine of estoppel, and holds that the bondholders and the defendants in this action are es-

topped to show that the commissioners had any other authority except the said act of 1879. With the greatest respect and deference to the opinion of the court, it seems to me that the doctrine of estoppel is not only misapplied, but that its use and purpose are misconceived in this application by the court. Estoppels are as to facts, and not of law. In such transactions as this, they are made to apply to a party stating the facts, and not to the party to whom they are stated. This seems to me to be elementary learning. But see Bigelow on Estoppel, pp. 4, 5, 6 and 7, and 356, and note 1: 'It is not the deed of the defendant, but of Isham (the grantor) only, by whom alone it is executed; and, not being the deed of the defendant, it cannot, as a deed, estop him from denying that the grantor had title.' And the same principle is held in the case of *Northern Bank v. Porter Township*, 110 U. S. 608, near the end of the opinion (cited by the court). In that case the bondholder was trying to estop the maker by holding him to the statements in the bond; and the court says that the maker is estopped by the recital of such facts as it was supposed to have special knowlege of,—such as that there had been a submission to a vote, and that a majority of the qualified voters voted for the bonds. But it was held that the defendant (the maker) was not estopped to show the law,—to show that the township had no legal authority to make the subscription and to issue the bonds. If the maker of the bonds was not estopped by the recitals in the bond from showing the want of legal authority to make the bonds, what rule of law or justice is there to estop the defendants in this case from showing that the commissioners of Wilkes county had the power—legal authority—to issue these bonds? It is said in the opinion of the court that 'estoppels are mutual,' and, as the plaintiff would be estopped by the recitals, that the defendant must be. This rule obtains in many instances, but I deny its application in this case, as I have shown above, from Bigelow on Estoppel and from *Northern Bank v. Porter Township*. But, were I to admit the rule to be that, where one party is estopped, the other party is also, what would be the result of the reasoning of the court, when I have shown that the maker would not be estopped to show the want of power?

"The court, in its opinion, says that certain positions were strenuously insisted on by the defendant. I

think this must be a mistake, as the case was not argued before us, either by brief or by oral argument, on behalf of the defendants. Mr. Turner and Mr. Wellborn, by leave of court, made themselves parties defendant after the action was brought, but they have given the case no further attention. Why they did this I do not know. The case appears to be a controversy so far as parties are concerned, for there are plaintiffs and there are defendants. But, as to the conduct of the case before this court is concerned it has been unilateral. The opinion of the court speaks of the reorganization of the railroad company, thereby defrauding some one out of his stock. The record furnishes no evidence of any reorganization of the railroad company. It is stated in the opinion of the court that the supreme court of the United States is the only court authorized to review this opinion. I agree with the court in this expression of opinion, but I have no idea that it will ever be reviewed by that court, as the case is decided in favor of plaintiffs, and the defendants have not taken interest enough in it to be represented by counsel, and it is not likely they will appeal. It is said that the talk of repudiation has had no effect on the court, and I have no idea that it has; and I hope that my aversion to repudiation has had no influence on me in coming to the conclusions I have reached. My opinion is that the bonds are valid, and that their payment should be enforced by the courts."

"FAIRCLOTH, C. J. I concur in the dissenting opinion."

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No. 167.
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No. 167.

THE BOARD OF COMMISSIONERS, WILKES COUNTY, ET AL.,

Appellants,

vs.

W. N. COLER & CO.

SUPPLEMENTAL BRIEF FOR W. N. COLER & CO.

CHARLES PRICE,
Solicitor.

By leave of the Court we file this brief in answer to Supplemental Brief of Appellants' Solicitor.

In the first place, we call the attention of the Court to the far-reaching effect of the case of *Brodnax vs. Groom*, cited in our former brief, 64 N. C., 244. In construing the decision in that case this Court will do it in the light of the fact that the Court had then before it a tax act, to which Article II., Section 14, of the Constitution, applied.

This rule not only applies to Courts, but to the public, the legal profession, the corporate authorities, the legislative department of the State, the judicial department of the State, and to the bondholders.

In *Brodnax vs. Groom* the plaintiffs were taxpayers seeking an injunction against a tax alleged to have been levied by the defendants, the Commissioners of Rockingham County, under an act (1868-1869, Chapter 102, *ratified* April 1st, 1869,) which provided: "That the Commissioners of the County of Rockingham be, and they are hereby, authorized to levy and collect a special tax for the purpose of building and repairing bridges in said County."

The objections to the act were as follows:

1. That the act was private, and was passed without the notice required by the Constitution, Article 2, Section 12.

2. That the Act did not specify the amount to be collected, or the particular bridges to be built.

3. That the Act had not been approved by a majority of the voters in the County, as required by the Constitution, Article 7, Section 7.

4. That, of the amount levied, $1,200, the Commissioners had contracted a debt which it would require $10,000 to pay.

Now, it is to be noted that this was an application made to the Court *before* any one had acquired a vested right, and the contention was, the act was *unconstitutional and void.*

In the argument of this case every objection seems to have been urged against the validity of the Act, for

the Court, speaking through the Chief-Justice, PEARSON, says *it is not necessary to enter into the question*, as to whether the Act was passed according to the Constitution. He says the *ratification* makes it a matter of record, which cannot be impeached. He further says *that acts of the legislature, public or private*, which include *all acts*, are matters of record. The illustration he uses, in saying, "Suppose an Act of Congress is returned by the President with his objections, and the Vice-President and the Speaker of the House certify that it passed, afterwards, by the Constitutional majority, *is it open for the Courts to go behind the record, and hear proof to the contrary?*"

In making this illustration, the Chief-Justice must have intended to apply the rule to *every* case. Because, when we look at Article 1, Section 7, of the Constitution of the United States, we find this to be the only instance, the only case mentioned in the constitution, where "the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the Bill shall be entered on the journal of each House respectively."

This Court, in passing upon the right of a bondholder purchasing his bond in open market in due course of trade for value in good faith, with no suspicion of any "*defect of authority or other irregularity*" on the part of those acting for the County in issuing and offering for sale the bond, will place upon this decision, *Brodnax vs. Groom*, that construction which will uphold the bond and protect the innocent holder. The legislature of the State, in passing acts in a similar manner *many times* during a period of twenty-five years, and allowing the Counties to contract debts of a similar nature,

during that period, to the amount of more than a half million of dollars, must have put this construction upon that decision. The public for the same period put that construction upon it. The corporate authorities of the Counties, issuing the bonds for this period, put that construction upon it. The legal profession of the State for that period, many members of which being *at all times* members of the Legislature, *and constituting the judiciary committees of the Senate and House of Representatives*, put that construction upon the decision. If not, then as the legal advisers of the Legislature, *having acts of a similar kind exclusively in charge*, as such they were engaged in setting "traps for the creditors of the State," a thing not to be supposed, as said in the Travis County case by Mr. Justice BROWN, already cited in the former brief.

The purchasers of all these bonds so issued, from time to time, for this period in good faith, put this construction upon that decision.

The Judicial department of the State put this construction upon that decision, as seen by the cases cited in the former brief, for a like period; and the Executive department of the State likewise so understood this decision, as is shown in the investment of the funds of the University in these bonds, referred to in the supplemental brief of appellants' solicitor on page 24. The amount thus invested in the Wilkes bonds was in the sum of $8,000, and in the Stanley bonds $6,000, both considered most desirable securities.

On page 22 of the supplemental brief of appellants it is suggested that the allegation of collusion, as made in the complaint in this suit, is gratuitous, and unnecessary to be answered.

We will show that the case of *Commissioners of Wilkes County vs. Clarence Call et al.*, 123 N. C., 308, decided November, 1898, was not only collusive, but was no case at all. In this case there were no adversary parties, it being a proceeding gotten up for the purpose of repudiating an honest debt, with no suggestion upon the part of anybody that the bonds in question were not sold in open market, in good faith, by the corporate authorities of Wilkes County, to the purchasers of the same, who were unaware of any defect of authority or other irregularity on the part of those acting for the County; nor was there anything to excite suspicion of such defect or irregularity, if any existed.

It is not denied that the sum realized by the County in the sale of these bonds was appropriated to the payment of the County's subscription to the stock of the Company. It is admitted that the railroad was built at a large cost, and has been in satisfactory and successful operation for years. It is admitted that the bonds came into the hands of the purchasers—complainants--and the interest paid on the same for seven years before the case of *Commissioners of Wilkes County vs. Call* was begun.

It is not denied that the County of Wilkes, and the State of North Carolina, have levied and collected taxes from this railroad every year since its completion.

It is not denied that, in the building of this road the people of Wilkes County, have realized a long cherished hope and desire for transportation facilities to enable them to transport their products to the markets of the country.

Not only these things have been accomplished, but

it will not be denied that there has been a large increase in the value of the property of the County on account of the extension of this road within its limits.

The said case of *Commissioners vs. Call* was *begun* in the Superior Court of Wilkes County on the 23d day of December, 1897, one month *after* the decision of the case of *Commissioners vs. Snuggs*, in November, 1897, 121 N. C., 394.

In the *Snuggs case* (which we will call the *Stanly case* hereafter) there was no bondholder a party at any time, and the allegations in the complaint in that case were only against the Treasurer of the County, as they were, in the *Wilkes case*, only against the Treasurer of that County. Indeed, the point decided in the *Stanly case* was the same presented for decision in the *Wilkes case*. That is to say, it was sought to enjoin the Treasurer's paying the interest on the bonds of both Counties on the same ground—to wit, the failure to enter on the journals the yeas and nays, as already explained.

After the decision of the lower court in the *Wilkes case*, the defendant Call refused to appeal because the Supreme Court had, just before, decided the point in the *Stanly case*.

The plaintiffs in the *Wilkes case* tried to persuade him to appeal, and offered to pay the expenses of the same (See answer of Clarence Call, p. 20 of certified record).

After Call, the sole defendant in the case, *declined* to perfect his appeal from the decree entered on the 18th of February, 1898, J. M. Wellborn and J. M. Turner, by leave of the Court and consent of the plaintiffs, on the 8th day of March, 1898, and *after the time for perfecting the appeal had expired*, filed an

answer to the complaint, *in which complaint* there was no allegation made against them, nor was the complaint at any time amended, so as to embrace any allegations against Wellborn and Turner.

After the appeal was perfected, these parties, Wellborn and Turner, paid no further attention to the case (See dissenting opinion of Justice FURCHES, concurred in by the Chief Justice).

After the time had expired for perfecting the appeal from the decree of the 18th of March, the plaintiffs obtained, with the consent of Wellborn and Turner, another decree, *not dated, and not responsive to any of the allegations in the complaint,* from which the appeal, it is contended, was prosecuted.

So that, upon a close inspection of the record, the Supreme Court of North Carolina could have seen there was no case in that Court to decide.

How could an appeal from a decree of a Court, entered, as this one was, upon a complaint in which there was no allegation against them, no prayer for relief against them, be prosecuted by Wellborn and Turner, alleged holders of one bond? Why, may we inquire, would a *bona fide* bondholder want to become a party to a proceeding when the *Stanly case*, already decided by the Supreme Court, had adjudged a similar bond void?

In the light of these facts, it is impossible for the human mind to escape the conclusion that this *Wilkes case* was a collusive proceeding. Indeed, it was upon its face a nullity; no *case*, but a *proceeding* imposed upon the Supreme Court of North Carolina, if we may use such an expression, for the purpose of accomplishing a repudiation of an honest debt.

In view of all this it is insisted by the learned

counsel for the county that this Court is bound by the decision in case of *Commissioners of Wilkes County vs. Clarence Call*, one of the certified cases ! ! !

It is not pretended that any bondholder was before the Court in the case of *Commissioners vs. Snuggs*, 121 N. C., 394, another one of the cases mentioned in the certificate (Record, p. 42); nor is it so pretended in the case of *Rodman vs. Washington*, 122 N. Car. R., 39; nor in *Commissioners vs. Payne*, 123 N. Car. R., 432, also mentioned in the certificate.

So that the only case contained in the certificate in which a *bona fide* bondholder was before the Court is *Bank vs. Commissioners*, 119 N. C.

In this case we call attention to what is said in our former brief on pages 29, 30 and 31.

In favor of bondholders, such as these complainants are, this Court will adopt the rule laid down by the Court when it was first decided in 1895, quoted on page 29 of the former brief.

In further argument we will only call attention to the case of *City of Charlotte vs. Shepard*, 122 N. C., 602. This is a late case, and the Court, in speaking of the power to create a debt, &c., says: "When such a corporation has thus acquired the right to create the debt and to issue the bonds, this power carries with if the power to levy the taxes necessary to pay said bonds and the accruing interest thereon." We beg that the Court consider this case in connection with what is said in our former brief on pages 50, 51 and 52.

The other points suggested and matters argued in the Supplemental Brief of Appellants have all been disposed of in our former brief.

CHARLES PRICE,
Solicitor.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 167.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.

vs.

W. N. COLER & COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF W. N. COLER & COMPANY.

Reply to Arguments of Counsel for Appellants Respecting the Ordinance of the Constitutional Convention, Passed March 9, 1868, and as to the impeachment of enrolled Acts by legislative Journals.

The learned counsel for the appellants apparently has undertaken to argue that the railroad in aid of which the bonds in question in the present case were

issued was not authorized by the ordinance of the Constitutional Convention, passed March 9, 1868. We have clearly shown in our main brief (p. 13, *et seq.*) that it was so authorized, and respectfully refer the Court to the argument there set forth at length.

The Original Ordinance authorized the railroad in Wilkes County in aid of which the bonds were voted, independently of the Act of February 20, 1879.

We understand the learned counsel for the appellants to argue that the particular railroad constructed in Wilkes county, in respect of which the bonds in question in the present case were issued, was a new branch line, and was not authorized until the passage of the act of February 20, 1879. In making this argument, however, the learned counsel is clearly mistaken in his facts. The language of Section 1 of said ordinance of March 9, 1868, printed in the record in this case, pages 24 to 27, is

> " a railroad of one or more tracks from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, *to some point in the northwestern boundary line* of the state, to be hereafter determined, a company is hereby incorporated," etc.

Now, a glance at the map of the State of North Carolina shows that such a railroad to the " northwestern boundary line of the state " must necessarily pass near or through Wilkes county. The northwestern boundary line of the state is the line which is reached by going in a northwesterly direction " from some point on the North Carolina Railroad, between

the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson County, running by way of Salem and Winston, in Forsyth county." This is the main line of the railroad as contemplated by the said ordinance of March 9, 1868; and that railroad, in respect of which the bonds were issued in the present case, is a part of such main line of railroad. It is true that the said road has not been constructed, we believe, beyond the town of Wilkesboro, in Wilkes county, and that the point on the northwestern boundary line of the state has not yet been determined, as indeed it has not been necessary to determine it, because the railroad has not yet reached, or approached near to, that boundary line, and the said ordinance did not prescribe any limit of time within which the said road should be constructed to the said northwestern boundary line.

When Section 1 of the said ordinance said the "*northwestern* boundary line of the state," it meant precisely what it said. It did not mean the *northern* boundary line of the state, to which the learned counsel for the appellants pointed in his oral argument. Not only is this obvious from reading this express language of Section 1 of the ordinance, but it is also further obvious from the language of Section 13 of the said ordinance (Record, p. 27), as follows, to wit:

"Be it further ordained, That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia."

When, therefore, the Constitutional Convention meant the *northern* boundary line of the state, to wit, the line of the State of Virginia, it said so, and de-

scribed the line as "the line of the State of Virginia," which is a wholly different thing from the *northwestern* boundary line of the state, mentioned in Section 1 of the said ordinance.

Furthermore, the topography of the country is such that the line of railroad described in Section 1 of the said ordinance, to wit, "a railroad of one or more tracks from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state" must necessarily run up the valley of the Yadkin river through Wilkes county. This is the only natural and practicable route, and was the one intended and prescribed by the said ordinance of March 9, 1868. On either side of this Yadkin valley are high hills and mountains, and this Yadkin valley forms the natural and only proper route for a railroad from the points mentioned to the northwestern boundary line of the state. In view of these facts of physical geography, well known to the Constitutional Convention which enacted the ordinance, this Section 1 is in reality as specific as if the said Convention had prescribed in express terms that this road should go up the Yadkin valley through Wilkes county, mentioning that county by name.

But in order to hold that the said ordinance of March 9, 1868, authorized the construction of the railroad in Wilkes county, and the issue of the bonds in question in respect thereof, it is not necessary that the said line of railroad in Wilkes county shall be deemed

a part of the main line of the said road. Section 13 of the said ordinance above quoted, provides :

" That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surrey county, to the line of the State of Virginia."

The road in question is not a branch which runs from Winston and Salem by way of Mount Airy, but that was only one of the branches which the said Section 13 authorized the said company to construct. It was also authorized to construct other branches. Even if the said railroad in Wilkes county is to be regarded as a branch of said railroad (although, as we have shown above, it is to be regarded not as a branch, but as a main line), yet these bonds now in question were properly authorized by the said ordinance to aid in the construction of such branch.

The railroad in question is not a "branch," but a part of the main line originally authorized by the Ordinance of the Constitutional Convention passed March 9, 1868, but even if it were a branch the road was authorized and the bonds are valid.

It is argued by the learned counsel for the county, in his supplemental brief (pp. 4 and 5), that the act of February 20, 1879, was the first authority for the construction of this railroad in Wilkes county, in aid of which the bonds in question were issued. That this is not the fact we have abundantly shown in our main brief *(p. 13 et seq.)*. The learned counsel, however, says that the act of 1879 amends Section 13 of the original charter, by adding the words (Record, p. 29)

"and one of which [branches] shall be constructed from the town of Winston and Salem, up the Valley of the Yadkin, by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory in the county of Caldwell, which branch shall be known as second division." The learned counsel in one breath argues that this act of February 20, 1879, is invalid, because the ayes and noes do not appear on the House journal in the second reading, and in the next breath he argues that this railroad in Wilkes county is a *new* road, and was not authorized by the ordinance of March 9, 1868, because this act of 1879 speaks of this road as a branch. In regard to this argument it is to be remarked that there is no magic in the name "branch," and it is immaterial in the construction of, the ordinance of March 9, 1868, whether the act of 1879, passed ten years afterwards, and by a different body of men, speaks of this road as a "branch." The real question is whether this railroad was authorized by the ordinance of March 9, 1868. As to this fact there can be no possible question. It may be that the learned counsel might argue that this act of February 20, 1879, is valid under the constitution so far as authorizing the construction of the road in Wilkes county, but invalid so far as authorizing Wilkes county to issue bonds. This argument would necessarily proceed on the theory that the legislature would have passed part of the act of February 20, 1879, if it had known that the other part of the act would fail and be void under the constitution; in other words, that the parts of the act are separable. It is by no means certain that such a construction, holding different parts of the act separable from one another, can be permitted. The language is,

"one of which [branches] *shall* be constructed," etc., "in the county of Wilkes." Here, then, is a mandatory requirement upon the railroad company to construct this branch, and *non constat* the legislature would have passed this mandatory act if it had not also accompanied the same with power to Wilkes county to issue bonds to aid in the construction of such road in Wilkes county.

The learned counsel for the county must, therefore, either take the act of February 20, 1879, as valid in its entirety, or invalid in its entirety, and cannot resort to it for the purpose of supporting his argument in one respect and at the same time claim that the act is invalid under the constitution.

Furthermore, even if this railroad constructed in Wilkes county is a branch, it was authorized by Section 13 of the original ordinance, although that Section 13 of the original ordinance did not make it mandatory upon the railroad to construct the same, this mandatory provision being first inserted in the act of February 20, 1879, and even if this railroad in Wilkes county were to be called a "branch," it was, nevertheless, authorized by the said ordinance of March 9, 1868, and that ordinance authorized the issue of bonds to aid in the construction thereof.

The learned counsel for the county also in his brief (p. 10) mentions the fact that the ordinance of March 9, 1868, in Section 12 thereof, refers to the act incorporating the North Carolina and Atlantic Railroad Company, whereas the name of that company should be the Atlantic and North Carolina Railroad. This was obviously a mere clerical error. The company and the act intended were certain, as was held by the

Supreme Court of North Carolina in the said *Belo case*, 76 N. C., 489 (our main brief, p. 22), where the court expressly refers to Section 34 of the said act of 1852, which is printed in the record in this case (p. 31), and mentions the same as being a part of the act referred to in the said Section 12 of the ordinance of March 9, 1868. This decision was rendered long before the bonds in question in the present case were issued, and conclusive in the matter as respects the present bonds.

The learned counsel for the county in his supplemental brief, page 11, argues that the framers of the constitution of 1868 clearly intended to safeguard the interests of the counties by having the attention of legislators called sharply to any proposition to levy a tax upon counties represented by them. We would go even further and say that the framers of the constitution in 1868 clearly intended to safeguard the interests of the counties by requiring that the voters of the county should vote upon any proposition to levy a tax or incur a debt, except for necessary expenses. This was the means by which any undue taxation or undue incurring of debt was to be checked and regulated. The people of the county voted almost unanimously in favor of the issue of the bonds in the present case, and any attempt now by the learned counsel to argue that any great public policy announced in the constitution of 1868 has been disregarded is utterly without foundation.

Galloway case wholly inapplicable.

The learned counsel for the appellants cites the case of *Galloway vs. Chatham Railroad Company*, 63 N. C.,

147 (1869). That case arose under Article V., Section 4, of the constitution of North Carolina, quoted in our main brief, page 107, which section refers wholly to bonds issued by the *State*, and not at all to bonds issued by the counties, and its provisions are different from any provisions, either constitutional or statutory, relating to bonds issued by counties. The Court in that case held (p. 158),

"that the road provided for in the act of 18th December, 1868, is neither an unfinished road nor one in which the *State* had, at the adoption of the constitution [April 24, 1868], a direct pecuniary interest."

No such question arises under the constitutional provisions or legislation applicable to the Wilkes County bonds.

The question in the case of *Galloway vs. Chatham Railroad Company*, 63 N. C., 147, was whether, under Article V., Section 5 (now Section 4), of the constitution, the general assembly of North Carolina had the power to pass the act of December 18, 1868, eight months after the adoption of the constitution (April 24, 1868), authorizing *a new line of railroad*, and providing for the isssue of state railroad aid bonds, *without submitting the question to a vote of the people of the State.* PEARSON, C. J., states the question involved and decided in the case as follows:

(p. 151 :) "Under Article V., Section 5, a question is made 'Has the General Assembly power to create this debt of two millions in aid of the Chatham Railroad Company unless the subject be submitted to a direct vote of the people?'"

The constitution, Article V., Section 4 (our main brief, p. 107), provided that no such State bonds could be issued

"except to aid in the completion of such railroads as may be *unfinished at the time of the adoption of this constitution*, or in which the state has a *direct pecuniary* interest, unless the subject be submitted to a direct vote of the people of the state and be approved by a majority of those who shall vote thereon."

The precise question, therefore, in this *Galloway case* was whether the road in question, authorized December 18, 1868, eight months after the constitution was adopted, was an "*unfinished*" road "*at the time of the adoption of the constitution*" within the meaning of the said Section 4, and the Court held, of course, it was not. *No such question arises in the present case.*

The line of railroad into Wilkes County was clearly authorized by the original ordinance of the constitutional convention passed March 9, 1868, Sections 1 and 13, and was not like the line of railroad mentioned in the case of *Galloway vs. Railroad Company*, 63 N. C., 147, a new line of railroad.

Article V, Sections 6 and 7 of the Constitution Considered.

The learned counsel for the county in his supplemental brief, page 15, summarizes what he alleges to be defects of the enabling acts relied on. He says, for example:

"3. If the reference [in the ordinance of 1868] incorporates the sections [33 to 37 of the act of 1852], as claimed, still there is no statement of a special object, but an attempt to confer authority to run branches to every county in the state, and authorize every county 'on or near' any line located to subscribe." The learned counsel obviously refers here to Article V, Section 7 of the constitution, which provides: "Every

act of the General Assembly levying a tax shall state the special object to which it is to be applied." Now, considering this section of the constitution, it is perfectly obvious that the said ordinance of March 9, 1868, and Sections 33-37 of the act of 1852 (incorporated therein by reference), do state a "special object," namely, the Northwestern North Carolina Railroad, which is a railroad to run "from some point on the North Carolina Railroad between the town of Greensboro, in Guilford County, and the town of Lexington, in Davidson County, running by Salem and Winston, in Forsyth County, to some point on the northwestern boundary of the state." The tax is to be applied to the payment of the bonds issued by counties on or near the line of this railroad in aid of the said railroad. The special object of the tax is to aid in the construction of this designated railroad, by paying the principal and interest of bonds issued by counties along the line of the road.

The learned counsel attempts to argue as if Article V., Section 7 of the constitution provided, not that every act of the assembly levying a tax shall state the "special *object*" to which it is to be applied, but that every act of the General Assemby authorizing any county to levy a tax shall state the name of the county. The county is not the "special object." No such language exists in Section 7, and there is no foundation for any such construction of it.

The same thing is to be said of Article V., Section 6, of the constitution, which provides that the taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner with the state taxes and shall never exceed the double of the state tax, except for a "special purpose," and with

the "special approval" of the General Assembly. A "special purpose" is stated in the said ordinance of March 9, 1868, and the said sections 35-37 of the act of 1852 made part thereof, and the "special approval" of the Constitutional Convention was given to the levying of such tax.

Furthermore, as we have already stated in our main brief, neither of these sections 6 or 7 of Article V. applies to the said ordinance of the Constitutional Convention of March 9, 1868. On their face and by their very language both these sections apply only to acts of the "General Assembly."

Moreover, the question whether or not the tax for the issue of the bonds in the present case exceeds double the state tax is nowhere raised on the record in the lower courts. It does not anywhere appear that this county tax will exceed double the state tax, and therefore the arguments of the learned counsel on this subject have no application to the present case.

In addition to the foregoing, as we have shown in our main brief, page 96, even if these sections 6 and 7 of Article V. of the constitution could apply to the said ordinance of March 9, 1868, and even if it were necessary for the county to levy double the state tax, all this is a matter *in pais*, to be determined by the board of county commissioners before the bonds are issued, and cannot possibly affect the holder of these negotiable bonds.

Further (see our main brief, p. 96), these bonds would be valid as bonds even though there might be a limit upon the tax rate.

Ordinance does not conflict with Art. V., Secs. 6 and 7 of Constitution.

We understand the learned counsel for the appellants to suggest in his supplemental brief, page 9, that the said ordinance of the constitutional convention passed March 9, 1868, is invalid under the constitution, Article V., Sections 6 and 7. These sections are printed in full in our main brief, page 108. We show in our main brief, page 93, *et seq.*, that these sections of the constitution do not prohibit legislation such as exists in the code of North Carolina, Sections 1996–2000. All of these reasons apply in the case of the said ordinance of the constitutional convention passed March 9, 1868.

There are also several further reasons which apply in the case of the said ordinance, to wit:

1. These sections relate solely to *acts passed by the General Assembly* and not at all to an ordinance adopted by the constitutional convention. The language of Section 7 is, "every act of the *General Assembly* levying a tax" etc. The language of Section 6 is, "approval of the *General Assembly.*"

2. There is nothing in the record in the present case or in the questions certified by the Circuit Court of Appeals to show that the county tax necessary for the payment of the interest on these bonds would exceed double the state tax.

3. These provisions, Sections 6 and 7 of the constitution, were complied with in the ordinance of the constitutional convention of March 9, 1868, in this—to wit,

that the said ordinance did express "a special purpose" for which the tax should be raised—namely, to pay the principal and interest of the bonds to be issued in aid of this *particular railroad*, and this provision had the "*special approval*" of the Constitutional Convention in this ordinance relating *specially* to the Northwestern North Carolina Railroad. The said ordinance, in Section 12 thereof, by reference made Sections 33–37 of the act of 1852 (record, p. 31) a part of the said ordinance. Said section 36 provides:

"It shall be the duty of the authorities of such town and the justices of such county to levy such taxes annually on the pesons, lands and other personal property within such town and county as may be sufficient to pay the amount of such bond or bonds and the interest thereon," etc.

This provision complies with Article V., Section 7 of the constitution, which provides that "every act of the General Assembly levying a tax shall state the *special object* to which it is to be applied, and it shall be to no other purpose," and states a "special purpose" and gives a "special approval" within the provisions of said Section 6 of Article V. of the constitution.

4. Whether or not the county tax would need to exceed double the state tax is a matter *in pais* with which *bona fide* holder of negotiable municipal bonds has no concern.

5. Furthermore, on this point it is sufficient, indeed, it is conclusive, to refer this Court to the case of *Belo vs. Commissioners*, 76 N. C., 489, reprinted in our main brief, page 22, where the Supreme Court of North Carolina, in 1877, at the suit of a

bondholder, long before these Wilkes County bonds were issued, held valid the said ordinance of the constitutional convention passed March 9, 1868, and especially held *valid the tax provisions* by issuing a mandamus to compel the county of Forsyth, which had issued bonds thereunder, to provide for the payment of said bonds.

The learned counsel in his supplemental brief, page 10, quotes a part of Section 12 of the said ordinance of March 9, 1868, as if that were all that was in the said ordinance authorizing the issue of bonds by counties, and omits any reference to Section 2. Said Section 2 provides as follows, Record, page 25:

"Be it further ordained tnat the capital stock of said company may be created by subscriptions on the part of individuals, corporations and *counties* in shares of One Hundred Dollars."

Barksdale case wholly inapplicable.

The case of *Barksdale vs. Commissioners*, 93 N. C., 472, 475, and other cases, are cited in the brief of the learned counsel for the county (p. 12.) In the case of *Barksdale vs. Commissioners*, the Court held that the tax there attempted to be levied violated Article V., Section 1 of the constitution of North Carolina,—a section in no way involved in the Wilkes County bonds. It is legally impossible that any decision under Section 1 could involve or settle the meaning of Sections 6 and 7 of the same article. Said Article V., Section 1, is as follows:

"The General Assembly shall levy a capitation tax on every male inhabitant in the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at three hundred dollars in cash. The commissioners of the several

counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax combined shall never exceed two dollars on the head."

The facts of the case are stated by MERRIMON, J. (dissenting,) as follows:

(p. 477.) "The plaintiffs in their complaint, allege in substance, that the defendant commissioners, in conjunction with the justices of the peace of Sampson county, have levied, and the defendant sheriff is about to collect, a tax of 13 1-3 cents on the $100 valuation of property, and 40 cents on the pole, for the further support of public schools in that county, as allowed by the statute (Acts 1885, ch. 174, § 23); that this tax levy is in excess of 66 2-3 cents on the $100 valuation of property and $2.00 on the poll, and is therefore, as they insist, not allowed, but is in effect forbidden by Art. V., § 1, of the Constitution. The defendants admit the facts as alleged," etc.

The court held that this tax violated the said Article V., Section 1. It was apparently urged upon the court that, notwithstanding the tax there in question clearly violated Article V., Section 1, of the Constitution, such defect was cured by the provisions of Article V., Section 6, of the Constitution, as being a tax for a *county purpose;* for court went on to say (p. 475):

"The levy finds no support in § 6 of article V., for this is not one for a '*special purpose* and with the *special* approval of the General Assembly' **for county purposes.** The enactment is in general applicable to the whole State, and part of the general **State legislation in furnishing facilities for the education of its people."**

The court thus held that the tax there in question was not a *county* tax for a "*county purpose*" within the meaning of said Section 6 of Article V. of the Constitution, but a *state* tax.

The case of *Barksdale vs. Commissioners*, therefore, held that the tax there in question was contrary to Article V., Section 1, of the constitution, and void for *that* reason. The court says (p. 476):

"Our decision rests upon the interpretation heretofore repeatedly given to the clause that directs the imposition of a poll tax equal to that imposed upon property valued for taxation at three hundred dollars, by which the taxes are both thus associated and arrested, when, on the poll, they reach the maximum of two dollars."

That was the question involved and decided in the case of *Barksdale vs. Commissioners*. Having decided that the tax was not for a "county purpose" within Section 6 of Article V. of the Constitution, the further remarks of the court as to what had been the "*legislative* interpretation" of Section 6 of Article V. of the Constitution were unnecessary to its decision. But the court does not say that any legislative interpretation had been given, that Section 6 of Article V. of the Constitution required the passage of a special act or an act naming a particular county in cases where the county tax was to exceed double the State tax (as is contended by the learned counsel for the county); and it does not say that any *judicial* interpretation whatever had been given to that section of the Constitution. There was no question involved in that case or decided therein, or in any of the cases cited therein by the court, that taxes for "county purposes" could not be levied except under a special act. But even if there had been, the tax in question in the present case, under the ordinance of the Constitutional Convention, passed March 9, 1868, is (as is shown *supra*) a tax for a "special purpose," and with the "special approval" of the Constitutional Convention, if

these be necessary under Section 6, Article VI., of the constitution in the case of An Ordinance of a Constitutional Convention, and this ordinance states the "special object" to which it is to be applied, if such statement be necessary under Section 7, Article VI., of the constitution—these being stated by incorporating the said act of 1852, Section 36 of which specifically states them (See said section printed in record, p. 32).

The cases cited by the Supreme Court of North Carolina in *Barksdale vs. Commissioners*, 93 N. C., 472, 476, do not sustain, and were not intended by that court to sustain, the proposition of the learned counsel for the county in his Supplemental Brief (p. 12) that, under Sections 6 and 7 of Article V. of the constitution of North Carolina, it is necessary that a special act be passed, or an act naming a particular county, in order that the county taxes may exceed double the state tax.

No such proposition was involved in the case of *Brodnax vs. Groom*, 64 N. C., 244; nor the court did not lay down in that case any proposition that, in order that a county tax might exceed double the state tax, the particular county or counties must be named in the act granting the power to tax.

In the case of *Simmons vs. Wilson*, 66 N. C., 336, the court enjoined the tax because there was *no legislative authority whatever* for it, and the court says (p. 337):

"We think the commissioners had no right to exceed the double of the state tax, except:

"(1) To pay debts of the county legally contracted prior to the adoption of the present state constitution. There do not appear to be any of these.

"(2) When the tax is for a special purpose, and has been allowed by *an* act of the legislature."

Observe that there is nothing whatever said here by the court that such act of the legislature must be limited to a county or counties specially named. The court only says "*an* act of the legislature."

The case of *Mauney vs. Commissioners*, 71 N. C., 486, did not decide any such question as that for which counsel now cites it. The point there decided is stated by the court as follows (p. 491):

"We concur in his Honor's views as to the constitutional limitations and equation of taxation to be applied to the different orders of debt. They may be disregarded as to old indebtedness, but must be applied to the new."

The court means, by "old indebtedness," indebtedness incurred before the adoption of the constitution, and, by "new" indebtedness, indebtedness incurred after the adoption of the constitution. *No question was made as to the passage or validity of any act, general or special, under Sections 6 and 7 of Article V. of the constitution.*

In the case of *Trull vs. Commissioners*, 72 N. C., 388, the court states the decision as follows (p. 391):

"In order to pay the debts which were contracted prior to the constitution taxes may be levied without regard to the constitutional limitation or equation, but in regard to new debts both must be observed."

There was *no question made in this case as to the passage or validity of any act, general or special, under Sections 6 and 7, Article V., of the constitution.*

In the case of *French vs. Commissioners*, 74 N. C., 692, there was *no act involved, either general or special,*

passed under Sections 6 and 7, Article V., of the constitution, and no question whether any such act must be general or special. The court decided what was stated in the headnotes of the case as follows :

" Taxation for state and county purposes, combined, for the current and necessary expenses of the county government and new debts, cannot exceed the constitutional limitation. There is no limitation, however, of the power of taxation upon either state or county for the payment of their lawful debts created before the adoption of the constitution."

The court accordingly held (p. 699) " the state tax of 38 cents and the county tax of 28⅔ cents on the $100 valuation exhausted the constitutional limitation of taxation for current expenses, and that the tax of 37 cents on the $100 for the payment of the old debt was legal."

In *Cromartie vs. Commissioners*, 87 N. C., 134, the court decided what is stated in the headnote, as follows :

" 1. Where the fund raised by taxation is required to meet the necessary expenses of a county government, and no part thereof can be legally applied to the satisfaction of a debt, the commissioners, acting in good faith in the execution of their powers, cannot be put in contempt for failure to pay such debt.

" 2. But in such case an *alias* writ of *mandamus* should be awarded, to the end that any excess of revenue raised under the law may be applied to the debt.

" 3. The commissioners have no power to increase the levy beyond the constitutional limit *without legislative authority, given in advance.*"

In that case also there was *no act before the court, general or special, passed under Sections 6 and 7, Article V., of the constitution, and no question before that court*

whether such act, if it were passed, should be general or special.

These cases were not cited by the Supreme Court of North Carolina in the case of *Barksdale vs. Commissioners* for the support of the proposition now advanced by the learned counsel for the county—namely, that any act whatever which is passed under Sections 6 and 7, Article V., of the constitution, in order to enable a county tax to exceed double the state tax, must be special, and must name the particular county—but they were cited for the proposition which they support, and which is stated in the analysis of these cases here above given—that is, in the language of the court in *Barksdale vs. Commissioners* (p. 476):

"These cases settle the extent of the taxing power when exercised by the county authorities, and allow its restraints only to be disregarded when the tax is needed to meet obligations existing before the adoption of the constitution, by virtue of the constitution of the United States, and decide that the limitations do not apply to other municipal corporations erected by law." [This summary of these cases is omitted by the learned counsel for the county in his quotation, supplemental brief, p. 12.]

It is clear, therefore, that neither the said case of *Barksdale vs. Commissioners*, nor any of the cases cited therein, establish the proposition, or was intended to establish the proposition, that under Sections 6 and 7 of Article V. of the constitution, in order to enable a county to levy a tax exceeding double the state tax, a "special act" must be passed naming by name the particular counties which should levy the tax. No such decision had ever been rendered by the Supreme Court of North Carolina prior to the issue of the bonds now in question.

Ordinance of March 9, 1868, in full force and Unrepealed.

It is not claimed or pretended by the learned counsel for the county that the said ordinance of March 9, 1868, has been in any wise repealed, or that any attempt has been made to repeal it, by the legislative assembly, even if such repeal by the legislative assembly were possible. The proposition is made on page 21 of the said supplemental brief that there was necessity for new legislation. No argument, however, is there stated in support of this proposition. No reason is stated, either in the said supplemental brief or in the original brief of the learned counsel, why the said ordinance of March 9, 1868, is not in full force and effect. As we showed in our main brief, Article II., Section 14, of the constitution is in express terms addressed to the legislative body, and is prospective—"No law shall be passed", etc. *(See on this point our main brief, p. 42, et seq.).*

Ordinance of Constitutional Convention passed March 9, 1868, not inconsistent with Constitution. Section 7, Art. VII. of Constitution may be read as amending said Ordinance and Act of 1852, if necessary.

We have also shown in our main brief (p. 45) that the said ordinance of March 9, 1868, was of the same dignity as the constitution, and was operative *per se* by its own force, and that it could be maintained, if necessary, that no provision of the constitution of 1868 would operate to modify or repeal the said ordinance if there was any conflict between the two. But it is not neces-

sary in the present case to maintain that proposition, for the constitution is not in any wise inconsistent with the said ordinance. Article VII., Section 7, of the constitution, which provides, in substance, that a county shall not contract any debt, etc., except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein, might apply to, and operate directly upon, any county in the state, and thus, if necessary, be written in as an amendment to the said ordinance of March 9, 1868. That in such a case such a provision of the constitution operates to amend an existing charter passed by an act of the legislature see case of *East St. Louis vs. Amy*, 120 U. S., 600; also the case of *East St. Louis vs. People*, 124 Ill., 655.

In the case of *East St. Louis vs. Amy, supra*, the facts were as follows: In 1869 the legislature of Illinois had passed an act granting the city of East St. Louis power to issue $100,000 of bonds, and to levy a tax of three mills for the payment thereof. In 1870 the new constitution of Illinois went into effect, which, in substance, required that a municipal corporation issuing any bonds should, at or before the time of doing so, provide for the levy and collection of a sufficient tax to pay the interest on such bonds, and to pay the principal within twenty years. This Court held that this provision of the constitution of Illinois of 1870 *did not repeal the said authority granted by the said act of 1869*, but that it amended it, and that *this amendment was, in effect, written into the charter*, so that the $100,000 of bonds were still authorized to be issued; but that, instead of the three mill tax levy provided in the charter for the payment thereof, a tax levy sufficient for the full payment of

the interest and principal could be levied, as required by the constitution.

The Supreme Court of Illinois, in the case of *East St. Louis vs. People, supra*, decided the same question the same way, and cited with approval the opinion of this Court in *East St. Louis vs. Amy, supra*. See, also, to the same effect the case of *Neal vs. Delaware*, 103 U. S., 370, cited by this Court in *East St. Louis vs. Amy*, 120 U. S., 600, 603, *supra*, in which case it was held that the Fifteenth Amendment to the Constitution of the United States of itself, and without any action by the State, was written into the election law and into the jury law of the State of Delaware as an amendment thereof, and that *no new legislation* for this purpose was required by the State of Delaware, but that these election laws and the jury laws stood, and were in force, as thus amended by the Fifteenth Amenment to the Constitution of the United States.

The vote required by the Constitution of North Carolina, Art. VII., Sec. 7, was had for the bonds now in question (see our main brief, p. 48, *et seq.*). A vote of the people of the County was required also by the said Ordinance of March 9, 1868, and sections 33–37 of said Act of 1852 referred to in section 12 of said Ordinance. The vote which was had satisfied both said Art. VII., Sec. 7, of the Constitution, and the said Ordinance and said Act of 1852.

The learned counsel for the county (supplemental brief, p. 15) again repeats the error of Justice FURCHES, that in the *Hill* and *Belo cases* the subscription was made and the bonds were issued *before* the adoption of the constitution of 1868. It is difficult to understand why the learned counsel persists in repeating this

obvious error and basing any argument thereon. The facts are stated and the dates specifically given by the Supreme Court of North Carolina in the *Hill case*, 67 N. C., 367, quoted at length in our main brief (p. 19), and again in the *Belo* case, 76 N. C., 489, quoted at length in our main brief (p. 22). It cleary and unquestionably appears there that the subscription was not made until the *June term, 1868*, after the constitution adopted April 24, 1868, went into effect; and the bonds were not issued until after August 11, 1868, for they recite an act of that date.

The learned counsel, in his supplemental brief (p. 17), apparently takes the curious position that in the *Hill case* and *Belo case*, reprinted in our main brief (p. 19 *et seq.)* the Supreme Court of North Carolina made a "*grave mistake as to the very essence and nature of the authority relied on*," and that it is the duty of this Court now to correct the mistake made by the Supreme Court of North Carolina in these cases. The fact is, the Supreme Court of North Carolina, in the *Hill* and *Belo cases*, made no mistake, but correctly construed the said ordinance of March 9, 1868, as giving, *per se*, authority to issue bonds precisely like the bonds now in question; but even if the Supreme Court had made a mistake in the *Belo case*, that case would, under familiar principles, be conclusive in favor of the holders of the present bonds, since that case was decided long before the present bonds were issued, and at the time of their issuance there was not any decision against their validity, nor any decision in any way modifying or overruling the said *Hill* and *Belo cases*.

No "policy" of the State against Railroad Aid Bonds. Provision as to "unfinished" railroads applies only in case of State aid bonds.

The learned counsel for the county apparently attempts to make an argument that there was a *policy* of the State of North Carolina, as evidenced in the constitution of that state, adopted in 1868, against issuing railroad aid bonds by either the state or counties, except in aid of roads which were unfinished at the time of the adoption of the constitution. There was no such policy. The only policy was this—that no State bonds should be issued to aid any *new* railroads, unless there should be a vote of the people, but with such a vote the state could aid any railroad, whether it had been begun or not at the time of the adoption of the constitution. If the railroad had been begun and was unfinished at the time of the adoption of the constitution, state bonds might be issued in aid thereof without any vote of the people. *As to counties, there was no distinction made as to whether the road was finished or unfinished at the time of the adoption of the constitution.* A vote of the people of the county was required for the issuance of railroad aid bonds of a county in either case, whether a road had been begun or was a new railroad, and there was absolutely no distinction whatever made in the constitution between new roads and unfinished roads so far as respects county aid, and no such distinction existed in the Code, or in any other provisions of the statutes.

The Code Sections 1996-2000 give power to issue the Wilkes County bonds.

On pages 19 and 20 of his brief, the learned counsel for the county says, in substance, in regard to the Code provisions, Sections 1996 to 2000, originally adopted April 10, 1869, these are to be construed the same as the provisions in the constitution of the state, Article V., Section 4, in regard to the issue of railroad-aid bonds by the state, stating : " It was deemed a part of the policy of the state to place its subdivisions under the same restrictions as the state, by preventing them from aiding in the completion of a road not then begun." There is not anything in the Code or in any of the statutes or in the Constitution of the State which supports any such view. The significant language of Article V., Section 4, of the constitution of the state, as applied to *state* railroad-aid bonds, is purposely omitted when the constitution deals with *county* bonds in Article VII., Section 7, and is purposely omitted from the said provisions of the Code. The Supreme Court of North Carolina, in *Commissioners of Stanly vs. Snuggs*, 121 N. C., 394, committed an obvious and glaring error in holding that the same provisions applied to a *county* as to the *state*.

We may note in passing that the learned counsel for the county, in quoting Article V., Section 4, of the constitution of North Carolina in connection with his argument in respect of code sections 1996 to 2000 (Supplemental Brief, p. 18), omits the significant words " *a direct pecuniary*," so that he makes a clause in that section, as respects state aid, read " a railroad which may be unfinished at the time of the adoption of the

constitution, or in which the state has *an interest*," whereas that section of the constitution really reads, " except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this constitution, or in which the state has a *direct pecuniary* interest, unless the subject be submitted to a direct vote of the people of the state," etc. On this subject see our main brief (p. 98 *et seq.*), showing that the claim of the learned counsel—that a " direct pecuniary interest " is required in the case of *county* bonds—is erroneous, and also that the decision of the Supreme Court of North Carolina in the case of *Stanly County vs. Snuggs*, 121 N. C., 394, is plainly erroneous.

The learned counsel for the county, in his supplemental brief (p. 19), speaks of the case of *Stanley County vs. Snuggs*, 121 N. C., 394, and says, in substance, that in that case the words in code section 1996, act of April 10, 1869, " in the completion of any railroad in which the citizens of the county may have an interest " were construed as speaking of railroads *unfinished* at the time of *the passage of the act or the adoption of the constitution.* The fact is, the court, in the case of *Stanly County vs. Snuggs*, held that those words in the code were retroactive and went back to the time of the adoption of the constitution (April 24, 1868), although there was not a word or syllable in the said Code, or in the act of April 10, 1869, to indicate that they were intended to have any such retroactive effect. The learned counsel continues (p. 19, bottom) :

" It was deemed a part of the *policy* of the state to place its subdivisions under the same restrictions as the state, by preventing them from aiding in the completion of a road not then begun."

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The fact is that there was no "policy of the state" to prevent a county from aiding in the completion of a road not begun at the time of the adoption of the constitution, or at the time of the passage of the act of April 10, 1869, nor even to prevent the state from aiding such road. The restriction was that a county should not aid any road begun, or not begun, unless by a vote of the people. The restriction on the part of the state was less than this, to wit, the state was permitted, *without* a vote of the people, to aid any railroad which had been begun, and was permitted to aid *any* railroad (begun or not begun) *with* a vote of the people.

The learned counsel for the county, after omitting from his quotation of Article V., Section 4, of the constitution, the significant words "*a direct pecuniary*" [interest], which apply only to *state* railroad aid *without* a vote of the people, then goes on seriously to argue, on page 20, that the same direct pecuniary interest is necessary in the case of aid by a county, although neither the code nor the constitution makes any such provision. The bare statement of such an argument is enough to refute it.

But however this may be, it is obvious from the *Hill* and *Belo cases*, quoted in our main brief (p. 19 *et seq.*), that this railroad had been begun before the passage of the act of April 10, 1869.

Furthermore, whether or not the railroad had been begun before April 10, 1869, or even before the adoption of the constitution (April 24, 1868), was a fact *in pais* to be determined by the county commissioners before they issued the bonds, and not a matter with which the holder of these negotiable municipal bonds is concerned.

The enrolled Act cannot be impeached by the Journals of the Legislative Assembly.

The cases of *Brodnax vs. Groom*, 64 N. C., 244 (1870); *Gatlin vs. Tarboro*, 78 N. C., 119 (1878), and *Scarborough vs. Robinson*, 81 N. C., 409 (1879), established the general principle in North Carolina that the enrolled act ratified and signed by the presiding officers of both houses of the General Assembly is conclusive, and cannot be impeached by the journals. On this point see our main brief, page 63 *et seq.* They established the principle that the ratification and the signatures of the presiding officers, described by the Supreme Court of North Carolina in *Scarborough vs. Robinson*, 81 N. C., 409 (our brief, p. 69 and 70), make the enrolled act a " matter of record, which cannot be impeached before the courts in a collateral way." This means, of course, that it cannot be impeached at all. The legislature itself cannot impeach it, and there is no direct proceeding, either before the legislature or the courts, for impeaching it. These decisions cannot be read as establishing any other or lesser principle. The record, and the only record, provided for by the constitution is the enrolled act. Article II., Section 23, provides expressly for the signature by the presiding officers of both houses. This, as stated in the case above mentioned, and in *Field vs. Clark*, 143 U. S., 649, is for the purpose of authenticating the act as the complete and finished record made by the legislative body. Referring to Article II., Section 14, of the constitution, there is no provision in that section to the effect that if the yeas and nays are not entered on the journals, the law shall be void ; there is no declaration

there that the entry of these yeas and nays shall be a record ; there is no provision there or in any other part of the constitution of North Carolina as to how the journals of the legislative body shall be authenticated (as there is for the signing and authentication of the enrolled acts) ; there is nothing in the constitution to insure the correctness of the journals.

Furthermore, there is no such distinction made in the constitution as is attempted to be made by the learned counsel for the county and by the Supreme Court of North Carolina in its recent decisions—no such refinement as that a part of the directions contained in Article II. addressed to the legislative body are mandatory and must be complied with or the law is no law, and that certain other parts of these directions to the legislative body need not be complied with.

In the *Oxford case*, 119 N. C., 214 (1898), the *first case* in North Carolina in which it was held that the journals of the General Assembly could be used to impeach an enrolled act duly signed as required by Art. 2, Sec. 23, of the Constitution, the Supreme Court of North Carolina reached that conclusion by saying that Section 14, Article II., of the constitution, declared something which it does not declare. That is to say, the Court says (119 N. C., 221) :

" The journals offered in evidence showed affirmatively that the yeas and noes on the second and third reading of the bill were not entered on the journal; and the constitution, the supreme law, says that unless so entered no law authorizing the state, counties, cities or towns to pledge the faith of the state, or imposing any tax on the property," etc., " *shall be void.*"

This is the first case in which it was so held, and all the other cases in North Carolina mentioned in Ques-

tion 1 certified (Record, p. 42), simply follow it like sheep following the leader. We wish to emphasize, with all possible force, that the constitution does not say that if the yeas and nays are not entered upon the journal *any act shall be void.* If it so said, it would put the whole world on its guard. It only says in section 14, as in Section 23 of the same Article II., all of the commands of which are addressed to the Legislature and to it alone, that before bills shall be " passed into laws " certain things shall be done by the Legislature. This same Supreme Court of North Carolina says that, if the things required by Section 23 are not done or not entered on the journal, the enrolled and signed bill cannot be impeached by the journals; but, when they come to pass upon Section 14 in this *Oxford case*, they declare that if one of its requirements—to wit, the entry of the yeas and nays—is not entered on the journal of either house, this is fatal, although the requirement that the bill shall be read on three several days, they announce, if not complied with, is not fatal, but the enrolled and signed act is conclusive.

Such refinements to support this new doctrine of the Supreme Court of North Carolina in the *Oxford case* have nothing to recommend them. They are wholly at variance with the fundamental principles announced by that Court in *Brodnax vs. Groom*, and repeated and reapplied in several other cases by that Court before the bonds of Wilkes County were issued. In short, the signing required by Article II., Section 23, as constituting the bill and act a *record*, applies as well to bills falling within Section 14 as to any other bills. This is the more obvious because it was such a bill as this which was in question in *Brodnax vs. Groom.*

We conclude our discussion of this point by repeating and emphasizing that there is a vast difference between the requirement in this Section 14 that certain things shall be done by the Legislature, and the meaning imputed to that section by the Supreme Court of North Carolina that if these things are not done Section 14 declares that the *act shall be void.* It does no such thing!

The true view is that which is well stated by the Supreme Court of Mississippi in the case of *Ex parte Wren*, 63 Miss., 512 (our brief, p. 86), that all these provisions of Article II. are mandatory upon the legislative body, and to be enforced by that body, which is directly responsible to the people of the state for its conduct in observing them. According to the learned counsel for the county, and according to the recent decisions of the Supreme Court of North Carolina, an arbitrary distinction should be drawn between part of these directions of Article II., addressed to the legislative body, and other parts thereof. For example, Article II., Section 16, provides: "Each house shall keep a journal of *its proceedings.*" Observe, here is a requirement that there shall be kept a "journal of its proceedings." This means, of course, all the proceedings. This is just as imperative and just as mandatory as the entry of the yeas and nays on the second and third readings in the case mentioned, as provided in Article II., Section 14. So, also, Article II., Section 23, provides: "*All bills* and resolutions of a legislative nature *shall be read three times* in each house before they pass into laws." As the houses are required to keep journals of their proceedings, they ought, under this requirement, to keep a journal which will show that all bills are read three times. And yet the Supreme Court

of North Carolina, in the case of *Carr vs. Coke*, 116 N. C., 223, decided that it is not necessary that the journals should show that bills are read three times, and the Supreme Court of North Carolina in the more recent decisions cited in the certificate of the United States Circuit Court of Appeals in this case, page 42, still state that they adhere to the ruling in *Carr vs. Coke.*

Such an arbitrary distinction as to the different requirements of Article II. of the constitution of North Carolina cannot be supported on sound principle. It is contrary to the rule laid down in the case of *Brodnax vs. Groom* and *Scarborough vs. Robinson*, and utterly at variance with those decisions. The case of *Brodnax vs. Groom*, moreover, was not dealing with an ordinary act, but was dealing with *an act levying a tax*—an act which, under Article II., Section 14, of the constitution, was required to be read on three different days, and to have the yeas and nays on the second and third readings entered on the journals, and yet the Supreme Court of North Carolina, speaking with reference to that very tax act then before it says :

" We are of opinion that the ratification certified by the lieutenant governor and the speaker of the house of representatives makes it," [that is, makes the tax act which Article II., Section 14 required to be read three several times, and to have the yeas and nays entered on the journals of both houses] " a matter of record," etc.

Furthermore, in that case of *Brodnax vs. Groom*, to make the *principle the ground and foundation* of its decision perfectly clear, the Court says :

" There can be no doubt that the acts of the legislature, like journals of the court, are *matters of record, and the idea that the 'verity of the record' can be averred against in a collateral proceeding is opposed to all of the authorities.*"

The learned judge then puts a case under the constitution of the United States, Article I., Section 7, which provides that in case of a veto by the president and passage of a bill over such veto :

" In all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively."

We say the learned judge puts a case under this provision: He says (*Brodnax vs. Groom*, 64 N. C., 244, 247):

" Suppose an act of Congress is returned by the president with his objections, and the vice-president and the speaker of the house certified that it passed afterwards by the constitutional majority, is it open for the courts to go behind the record and hear proof to the contrary ? "

This shows conclusively that the learned judge who rendered the opinion in *Brodnax vs. Groom* laid down the rule, and intended to lay down the rule, so as to cover the case prescribed by Article II., Section 14, of the constitution of North Carolina, which required the yeas and nays to be entered upon the journal, as well as other cases of enrolled acts under the constitution of of North Carolina. In fact, the learned judge, as above stated, had before him at the time a tax act which required the yeas and nays to be entered under Article II., Section 14. In the face of these express declarations of the Supreme Court of North Carolina in *Brodnax vs. Groom*, there cannot be any possibility of doubt as to what the court decided and intended to decide in that case.

In addition, this case of *Brodnax vs. Groom* was understood by this court, by the court in Mississippi, by the learned Attorney-General who made the note to

Field vs. Clark, 143 U. S., 649, 677, and by the legislative body year after year, and by the legal profession generally, to hold that the enrolled act is conclusive and cannot be impeached by the journals.

The Classification Attempted by the Learned Counsel for the County.

The classification attempted by the learned counsel for the county in his supplemental brief, page 3, is wholly without foundation in the decisions of the Supreme Court of North Carolina rendered prior to the time when these bonds were issued. All these decisions really proceeded upon the fundamental proposition decided in *Brodnax vs. Groom*, that the enrolled act is conclusive and cannot be impeached by the journals. No such arbitrary classification is made either by the constitution itself or by any of the decisions. The learned counsel states his third class as follows (his supplemental brief, p. 3.):

"Where there is a command or a prohibition to do or not do a thing, and a requirement that the evidence of the proceeding shall be preserved in a particular case, as in that at bar."

As has been stated above, the requirement of Article II., Section 16, is that, each house shall keep a journal of its proceedings. Article II., Section 23, provides: "All bills and resolutions of a legislative nature shall be read three times in each house." How, then, can the learned counsel say that this does not make a command upon the legislature to keep a journal of its proceedings, and to have such journals show that each bill is read three times. This is a command precisely

as much as is the command in Article II., Section 14, as to the reading of a bill on three days, and the entry of the yeas and nays.

Any one reading the decisions cited by the learned counsel for the county in his brief (p. 3) in support of his so-called classifications, and reading further the case of *Brodnax vs. Groom*, would certainly be surprised to learn that these cases had warranted any such classification of the different requirements of Article II. of the constitution of North Carolina. On the contrary, those cases all proceed, as stated, upon the fundamental proposition announced in *Brodnax vs. Groom*, that the enrolled act—in that case a tax act—is conclusive and cannot be impeached by the journals.

Supervisors vs. Post, 94 U. S., 260, and Post vs. Supervisors, 105 U. S., 667, are not like present case.

The cases of *Supervisors vs. Post*, 94 U. S., 260, and *Post vs. Supervisors*, 105 U. S., 667, cited by the learned counsel for the county in his supplemental brief (p. 1), are the same cases as *Ottawa vs. Perkins*, 94 U. S., 260, and *Amoskeag Bank vs. Ottawa*, 105 U. S., 667, referred to in our main brief (p. 11), construing the constitution of Illinois, and following a decision of the Supreme Court of that state rendered long *before* the bonds there in question had been issued, and not rendered after bonds were issued, as were the decisions in the Supreme Court of North Carolina mentioned in the certificate of the Circuit Court of Appeals in the present case (Record, p. 42). The cases of *Board of Commissioners vs. Coler*, 96 Federal Reporter, 284, and *Board of Commissioners vs. Union Bank*, 96 Federal

Reporter, 293, also cited by the counsel for County (Supplemental brief, p. 1), were rendered by the Circuit Court of Appeals of the Fourth Circuit, when they were under the impression that they were bound to follow the recent decisions of the Supreme Court of North Carolina, cited in the certificate (Record, p. 42).

State vs. Patterson, 98 N. C., 660, not like Present Case.

The principle stated by the Supreme Court of North Carolina in *State vs. Patterson*, 98 N. C., 660, quoted in the supplemental brief of the learned counsel for appellant (p. 2)—to wit, that a requirement of the constitution was mandatory—is, of course, correct as stating a general principle. The requirements of Article II. of the constitution of the State of North Carolina of 1868 are mandatory as addressed to the legislature, but the language quoted from *State vs. Patterson* does not decide anything, one way or the other, whether the enrolled act can be impeached by an examination of the journals of the legislature. In the case of *State vs. Patterson*, there mentioned, it was held merely that a statute without an enacting clause prescribed by the constitution, Article II., Section 21, is void. *This defect, of course, appeared upon the face of the enrolled act*, so that there was no question in that case of resort to the journals to impeach the act.

JOHN F. DILLON,
HARRY HUBBARD,
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Of Counsel for W. N. Coler & Company.

Supreme Court of the United States.

No. 167.—October Term, 1900.

The Board of Commissioners of Wilkes County et al., Appellants, *vs.* W. N. Coler & Company. } On a certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

[March 18th 1901.]

The ultimate question in this case is whether the county of Wilkes, North Carolina, is liable upon certain bonds issued in 1889 in payment of a subscription in its name to the capital stock of the North Western North Carolina Railroad Company.

Each bond was in the usual form of such instruments, was made payable October 1st 1913, and recited that it was "one of a series of one hundred bonds of the denomination of one thousand dollars each, issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February A. D. 1879, entitled 'An act to amend the charter of the North Western North Carolina Railroad for the construction of a *second division* from the towns of Winston and Salem, in Forsyth County, up the Yadkin Valley, by Wilkesboro, to Patterson's Factory, Caldwell County,' and authorized by a vote of a majority of the qualified voters of Wilkes County, by an election regularly held for that purpose on the 6th day of November A. D. 1888, and by an order of the Board of Commissioners of Wilkes County made on the first day of April A. D. 1889. This series of bonds is issued to pay the subscription of one hundred thousand dollars made to the capital stock of the North Western North Carolina Railroad Company by said county of Wilkes."

The question of a subscription by Wilkes County to the extent of $100,000 to the stock of that company, to be paid in bonds, was submitted to a popular vote and a majority of the qualified voters approved of the proposition. Taxes were imposed and collected for eight years to pay the interest on the bonds and the amounts collected were so applied; but the county officers refused to pay the interest due and payable April 1st 1896, April 1st 1898 and October 1st 1898, although they had in their hands moneys collected from taxpayers for that purpose. The object of the present suit was to compel those officers to apply the moneys so collected in payment of such interest.

Was the act of 1879—which was recited in the bonds as authority for their being issued—passed by the legislature in such manner as to become

a law of North Carolina? Was there power to issue the bonds without the aid of that enactment? These are the principal matters involved in or depending upon our answer to the certified questions.

The material facts upon which the decision of the case depends are as follows:

The Convention that assembled at Raleigh, North Carolina on January 14th 1868 for the purpose of framing a Constitution for that State concluded its labors on March 16th of the same year. The Constitution adopted by that body was ratified April 24th 1868, and was approved by Congress June 25th 1868. 15 *Stat.* 73, *c.* 70.

A few days prior to its final adjournment, namely, on the 9th day of March 1868, the Convention passed an ordinance (which, by its terms, was to take effect from its passage) that constituted the charter of the North Western North Carolina Railroad Company. The company was incorporated by the ordinance for the purpose of constructing a railroad of one or more tracks from some point on the North Carolina Railroad between the town of Greensboro in Guilford County and the town of Lexington in Davidson County, running by way of Salem and Winston in Forsyth County "to *some* point *in the northwestern boundary line* of the State *to be hereafter determined.*"

By the 5th section of the ordinance it was provided that after the organization of the company its officers should proceed "to locate the *eastern* terminus of the North Western North Carolina Railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem, in Forsyth County, which portion of said railroad, when completed, shall constitute its *first division.*"

By the 12th section it was declared that "all *counties* or towns subscribing stock to said company shall do so in *the same manner* and *under the same rules, regulations and restrictions* as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company;" and by section 13, that "the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry County, to the line of the State of Virginia."

The North Carolina and Atlantic Railroad Company referred to in the 12th section was the Atlantic and North Carolina Railroad Company incorporated by an act of Assembly approved December 27th 1852. By the 33d section of the charter of that company it was declared to "be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of

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said county, in manner and form as hereinafter provided." Provision was made (§ 34) in the same act to take the sense of the qualified voters of any town or county upon the question of a subscription by it to the stock of the company, and it was declared (§ 35) that if a majority of the qualified voters of any county or town voting upon the question were in favor of the subscription, the corporate authorities of the town and the justices of the county should appoint an agent to make the subscription in behalf of such town and county, to "be paid for *in the bonds of such town and county*, and on such time as shall be agreed on by said town officers and the justices of such county." *Laws N. C.* 1852, *pp.* 484, 499.

By an act of Assembly of August 11th 1868, the ordinance of March 9th 1868 was re-enacted, ratified and confirmed. By the same act also the commissioners of Forsyth County were invested with authority to levy from time to time such tax as was sufficient to pay the subscriptions made to the capital stock of the North Western North Carolina Railroad Company, and any interest due thereon, or to liquidate any debt created in borrowing money to pay the subscription of stock. At the end of that act as published are the words, "Ratified the 11th day of August A. D. 1868."

By the first section of the above act of February 20th 1879, it was declared that "section 13 of chapter 17 of the ordinance of the Convention of 1868, ratified the 9th day of March 1868, be amended by adding the words—'and one of which shall be constructed from the town of Winston and Salem, up the valley of the Yadkin by the way of Jonesville *and Wilkesboro, in the county of Wilkes*, to Patterson's Factory, in the county of Caldwell, which branch shall be known as the *second division*.'" By the first and second sections the ordinance of 1868 was further amended in particulars that need not be mentioned. By the fourth section it was provided: "That any township or city, town, county or other municipal corporation of this State shall have power and authority to subscribe for and take any number of shares of capital stock of said company that a majority of the voters of such township or city, town, county or other municipal corporation may elect to take therein." After prescribing the mode in which the will of the people as to a subscription of stock should be ascertained, that section proceeded: "If the result of any such election shall show that a majority of the qualified voters of any township or city, town, county or other municipal corporation, favor the taking of the amount of stock so voted for in such election, then the authorities who, by this act, are empowered to determine what amount of stock shall be taken, shall subscribe the amount of stock so voted for in said company, and shall have power to levy and collect taxes for that special purpose to pay for the said stock in installments as the same may become due, or, in case it shall not be deemed best to collect

taxes to pay by taxation such subscription for stock, then such township or city, town, county or other municipal corporation shall have power to issue bonds for the purpose of raising money to pay for such subscription, and shall provide for the payment of interest upon such bonds, and also for the payment of said bonds when they become due: . ." At the close of that act, as published, are these words: "Read three times in the General Assembly and ratified the 20th day of February A. D. 1879."

Another act was passed March 2d 1881. By that act the North Western North Carolina Railroad Company was authorized to extend and construct its line of road, or a branch thereof, to commence at or near Winston, in the county of Forsyth, through the counties of Forsyth, Davidson, Yadkin, Davie, Rowan and Iredell, or any or either of them, to Statesville, or some other point on the Western North Carolina Railroad, and to build and operate additional branches thereto, or from its present main line, to any important mines or manufactories in any of said counties, or counties adjacent to them; and any corporation, county, city, town or township interested therein was empowered to subscribe to stock for those purposes, or otherwise contribute to the work in such manner and amount as should be determined by the proper authorities of such corporation, county, city, town or township, and agreed on with the said North Western North Carolina Railroad Company. At the close of that act, as published, are the words: "In the General Assembly, read three times and ratified this the 2d day of March A. D. 1881."

The validity under the Constitution of the State of each of the above acts of March 11th 1868, February 20th 1879 and March 2d 1881 was questioned upon grounds presently to be stated.

In the Circuit Court judgment was rendered in favor of the plaintiffs, Coler & Co., who were found to be *bona fide* holders for value of some of the bonds. The case was carried to the Circuit Court of Appeals, and is now here upon questions certified under the judiciary act of March 2d 1891. 26 *Stat.* 826.

The certified questions are as follows:

"1. Whether, upon the averments of the bill of complaint, answers, replications, orders, exhibits, and other evidence, and matters and things recited herein, the Circuit Court of the United States was bound in passing upon this case by the decisions of the Supreme Court of North Carolina in the following cases: *Commissioners of Wilkesy Count* v. *Clarence Call et al.*, 123 *N. C.* 308; *Bank* v. *Commissioners*, 119 *N. C.* 214; *Commissioners* v. *Snuggs*, 121 *N. C.* 394; *Rodman* v. *Washington*, 122 *N. C.* 39; *Commissioners* v. *Payne*, 123 *N. C.* 432, considered in connection with prior decisions of said court and the following provisions of the Constitution of said State: Article 2, sections 14 and 16, and Article 5, sections 1, 4, 6, and 7, and Article 7, section 7.

"2. Whether, if the bonds and coupons in question were issued, put in circulation, and came to the hands of complainants, appellees, in due course of trade, for valuable consideration and without notice, and if there were at that time no decision of the Supreme Court of North Carolina adverse to these bonds or identical bonds issued under similar statutes, the bonds held by complainants are valid bonds.

"3. Whether there was any decision adverse to the validity of these bonds or identical bonds or any construction of the Constitution or law of North Carolina which affected the question of their validity when they came in due course of trade and for valuable consideration and without notice other than such notice as the parties are assumed to have of existing provisions in the Constitution and statutes of the State of their invalidity."

Mr. Justice HARLAN, after stating the facts as above reported, delivered the opinion of the Court.

This being the case disclosed by the record, we proceed in our examination of such matters involved in the certified questions as are presented with sufficient distinctness to require notice at our hands.

The county insists that the bonds in question were issued in violation of the 14th section of Article 2 of the Constitution of the State, which is in these words: "No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, *and unless* the yeas and nays on the *second* and *third reading of the bill* shall have been *entered on the journal.*"

In support of the above proposition reliance is placed upon the cases named in the first of the certified questions.

We are asked whether the Circuit Court was bound to follow those decisions when considered in connection with prior decisions of the Supreme Court of North Carolina and with the above and other provisions of the State Constitution, by one of which it is declared that "each house shall keep a journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly." *Art.* 2, § 16.

Premising that the journals of the two houses were put in evidence and that it did not appear therefrom that the yeas and nays, on the second and third readings of the acts of 1868, 1879 and 1881, respectively, were entered on the legislative journals, let us inquire as to the scope of the decisions in the above cases.

In *Bank* v. *Commissioners*, 119 *N. C.* 214, 220 (1896), which involved the validity under the 14th section of the State Constitution of an act passed in 1891 authorizing a municipal subscription to the stock of a railroad company and the issuing of bonds in payment thereof, it was said: "This section of the Constitution is imperative and not recommendatory, and must be observed; otherwise this wise and necessary precaution inserted in the organic law would be converted into a nullity by judicial construction. . . The point is one of transcendent importance, and is simply whether the people, in their organic law, can safeguard the taxpayers against the creation of State, county and town indebtedness by formalities not required for ordinary legislation, and must the courts and the legislature respect those provisions? This safeguard is section 14 of Article 2 of the Constitution. . . The journals offered in evidence show affirmatively that 'the yeas and nays on the second and third reading of the bill' were not 'entered on the journal.' And the Constitution, the supreme law, says that, unless so entered, no law authorizing State, counties, cities or towns to pledge the faith of the State or to impose any tax upon the people, &c., shall be valid. . . The people had the power to protect themselves by requiring in the organic law something further as to acts authorizing the creation of bonded indebtedness by the State and its counties, cities and towns than the fact certified to by the speakers of three readings in each house, and ratification. This organic provision plainly requires, for the validity of this class of legislation, *in addition* to the certificates of the speakers, which is sufficient for ordinary legislation, the entry of the yeas and nays on the journals on the second and third reading in each house. It is provided that such laws are 'no laws,' *i. e., are void unless* the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, *and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal.* This is a clear declaration of the nullity of such legislation unless this is done, and every holder of a State or municipal bond is conclusively fixed with notice of this requirement as an essential to the validity of his bond. If he buys without ascertaining that constitutional authority to issue the bond has thus been given, he has only himself to blame. 1 *Dill. Mun. Corp.* 545, and cases cited. It is certainly in the power of the sovereign people in framing their Constitution to require as a prerequisite for the validity of this class of legislation these precautions and the additional evidence in the journals that they have been complied with, over and above the mere certificate of the speakers which is sufficient for other legislation. That the organic law does require the additional forms and the added evidence of the journals is plain beyond power of controversy. . . The certificate of the speakers is not good for more than it certified, *i. e.*,

that the bill has been read three times in each house and ratified. And ordinarily that makes the bill a law. But *for this class of legislation* the Constitution provides that the facts thus certified by the speakers will make no law unless it further appears that the yeas and nays have been recorded on the journals on the second and third reading in each house. The Constitution makes the entry on the journals essential to the vality of the act."

These principles were again announced in *Commissioners* v. *Snuggs*, 121 *N. C.* 394, 398 (1897), which also involved the validity of county bonds issued in payment of a subscription to the capital stock of a railroad corporation. It appeared that the act relied on as authority for issuing them passed its third reading in the House of Representatives without any entry on the journal of the yeas and nays. The court said: "We are of opinion that it was competent to introduce the House journal as proof that the acts referred to were not passed according to the requirements of the Constitution, and they established that fact. That provision of the Constitution (section 14 of Article 2) is mandatory, as we have decided in *Bank* v. *Commissioners*, 119 *N. C.* 214. It is the protection which the people, in convention, have thrown around themselves for the benefit of the minority as well as the majority. . . The bill may, in point of fact, have been read three several times on three different days, and the yeas and nays have been actually called on the second and third readings and the presiding officers may have certified thereto, and yet, if the entry of the yeas and nays is not actually made on the journal, the Constitution speaking with absolute clearness says that the failure of such entry is *absolutely* fatal to the validity of the act. The entry, showing who voted on the bill and how they voted, must be made before the bill can ever become a law. The Constitution does not allow the certificate of the presiding officers or any other power to cure such an omission. The certificate of these officers will be taken as conclusive of the several readings in ordinary legislation, even if it could be made to appear that the journals were silent in reference thereto, because, in ordinary legislation, the directions of the Constitution are not a condition precedent to the validity of the act. But, in that class of legislation, the purpose of which is to legislate under section 14 of Article 2 of the Constitution, a literal compliance with the language of that section is a condition precedent and one which must be performed in its entirety before the bill can ever become a law."

These two decisions were followed in *Radman* v. *Washington*, 122 *N. C.* 39, 41 (1898), and *Commissioners* v. *Payne*, 123 *N. C.* 432, 487 (1898).

The same question arose in *Commissioners of Wilkes County* v. *Call*, 123 *N. C.* 308, 310 (1898). That case involved the validity of the identical issue of bonds that are here in suit. Referring to its former decisions, above cited,

the court said: "Under the authority of those decisions we are compelled to hold that the entire issue of these bonds is null and void for want of legislative authority. An act of the legislature passed in violation of the Constitution of the State, or in disregard to its mandatory provisions, is to the extent of such repugnance absolutely void; and all bonds issued thereunder bear the brand of illegality stamped upon their face by the hand of the law. The act under which these bonds profess to have been issued [the above act of February 20th 1879] was never legally passed and never became a law."

To the above cases we may add that of *State* v. *Patterson*, 98 *N. C.* 660, 662, 664, determined in 1887 before the bonds in question were issued. That was an indictment for selling spirituous liquors in a certain county wherein sales were prohibited by a supposed statute. *Priv. Acts, N. C.* 1887, *c.* 113, § 8. The defendant, under the plea of not guilty, claimed that the statute cited was void, because it had no enacting clause, that is the words, "The General Assembly of North Carolina do enact." The court, referring in its opinion to the constitutional provision that "the style of the acts shall be, 'The General Assembly of North Carolina do enact,'" *Art.* 2, § 21, and to the provision "that all bills and resolutions of a legislative nature shall be read three times in each house, before they pass into laws, and shall be signed by the presiding officers of both houses," *Art.* 2, § 23, held that the statute under which the prosecution was inaugurated was not a law. The court, among other things, said: "It thus appears that its framers, and the people who ratified it, deemed such provisions wise and important, the purpose being to require every legislative act of the legislature to purport and import upon its face to have been enacted by the General Assembly, and to be further authenticated by the signatures of the presiding officers of the two houses comprising that body. The purpose of thus prescribing an enacting clause—'the style of the acts'—is to establish the act—to give it permanence, uniformity and certainty—to identify the act of legislation as of the General Assembly—to afford evidence of its legislative, statutory nature, and to secure uniformity of identification, and thus prevent inadvertence, possible mistake and fraud. Such purpose is important of itself, and as it is of the Constitution, a due observance of it is essential. The manner of the enactment of a statute is of its substance. This is so in the nature of the matter, as well as because the Constitution makes it so."

After the decision in *State* v. *Patterson*, rendered as above stated before the bonds in suit were issued, it might have been anticipated that the same court would hold as they did in the subsequent cases above cited that the entering of the yea and nay vote on the second and third readings of an act of the class mentioned in section 14 of Article 2 of the State Constitution was a condition precedent that could not be dispensed with under any circumstances.

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The defendants however contend that by the decisions of the Supreme Court of North Carolina, as those decisions stood at the time the bonds were issued, a person consulting the laws of the State was not bound to examine the journals of the legislature and ascertain at his peril whether such acts had been passed in the particular manner prescribed by the Constitution; that every one could properly assume that the act of February 20th 1879, signed by the proper officers, and enrolled and published as one of the statutes of the State, was passed in conformity with the constitutional provision as to the entry on the journal of the yea and nay vote on the second and third readings of a bill.

The North Carolina cases cited by the defendants in support of this proposition are *Brodnax* v. *Groom*, 64 *N. C.* 244 (1870), *Gatlin* v. *Town of Tarboro*, 78 *N. C.* 119 (1878), and *Scarborough* v. *Robinson*, 81 *N. C.* 409 (1879). Let us see what was involved in those cases.

In *Brodnax* v. *Groom* it was held that the courts could not go behind an enrolled act, duly certified by the presiding officers of the two houses of Assembly, to ascertain whether there had been a compliance with the 12th section of Article 2 of the State Constitution providing that the "General Assembly shall not pass any private law unless it shall be made to appear thirty days' notice of application to pass such a law shall have been given, under such direction and in such manner as shall be provided by law."

In *Gatlin* v. *Town of Tarboro* the question was as to the validity of a tax levied by a town, which was resisted on the ground that the act was private and had been passed without any notice of the application as required by the Constitution (*Art.* 2, § 12), and was therefore void—the parties admitting that no such notice was given. The court said: "As to the second point: If it appeared from the act itself, or affirmatively appeared by the journals of the legislature, which would have been competent evidence, that the notice of the intended application for the act, which the Constitution requires, had not been given, we should probably hold the act void. We have not consulted the journals. That was evidence to be offered in the court below. Probably they are silent as to the fact whether it appeared that the required notice had been given or not. In that case we think the presumption would be that the legislature had obeyed the Constitution, and that it appeared that notice had been given. '*Omnia præsumuntur rite esse acta.*' We cannot accept the agreement of the parties that no notice was in fact given, as proof that it did not appear to the legislature that the required notice had been given. In such a case the best and only proof is by the record. Our opinion on this point is supported by a recent decision in Illinois. *Happel* v. *Brethaner*, 70 *Ill.* 166. If any weight were allowed to admissions of this sort, the law

might change as each case was presented. Our opinion on this point renders it unnecessary to determine whether the act was technically a public or private one."

In *Scarborough* v. *Robinson* the issue presented was as to the power of the court to compel the presiding officers of the two houses *to sign* an act to the end that it might be authenticated—it being alleged that the bill had been duly ratified by the two houses as shown by their respective journals. That case arose under section 23 of Article 2 of the State Constitution providing that "all bills and resolutions of a legislative nature should be read three times in each house, before they pass into laws, "and shall be signed by the presiding officers of both houses." Preliminary to the decision of the question really involved in that case the court made some general observations upon the question whether the existence and validity of a statute should depend "upon the uncertain results of an inquiry made in each particular case, whether the provisions of the Constitution directing the mode of legislative proceedings have been followed in the action of the two houses in passing a bill through its different stages of progress." But it was added that the determination of that question was not necessary to a decision of the application before the court. It was then decided, and nothing more was decided than, that "the signatures of the presiding officers of the two houses, under and by force of the words used in our Constitution, are an essential prerequisite to the existence of the statute—the finishing and perfecting act of legislation—and must be affixed during the session of the General Assembly." Upon that ground only the application for a mandamus was denied.

It thus appears that no one of the cases cited by defendants involved a construction of section 14 of Article 2 of the State Constitution. Those cases arose under other provisions of the Constitution. It is true that in *Scarborough* v. *Robinson* there are general expressions touching questions adverted to but not decided, that lend apparent support to the contention that the North Carolina decisions rendered after the issuing of the bonds in suit were not, in all particulars, in harmony with what was said by the State court in prior cases. But such general expressions as to matters expressly excluded from decision are not authority and reference must be had to the points in judgment.

In view of the cases determined by the highest court of North Carolina involving the precise point now under consideration, was the Circuit Court of the United States justified in holding the acts of 1868, 1879 and 1881 to be laws of the State? Observe that the issue is not as to the construction, meaning or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose. May a Federal court disregard the decisions of the highest court of the State holding that

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such enactment, in the form of a statute, was never passed so as to become, under the State Constitution, a law?

These question have been so distinctly answered by this court in cases heretofore decided that a discussion of them upon principle is unnecessary.

In *Town of South Ottawa* v. *Perkins*, 94 *U. S.* 260, 267, 268, which was an action upon municipal bonds, the question was whether any such statute ever existed as that under the authority of which the bonds there in suit purported to have been issued. It was contended that as the bonds were held by a *bona fide* purchaser for value, and as the town sued had paid the first instalment of interest, it was estopped from offering any evidence that the act under the authority of which the bonds purported to have been issued was not legally passed, the same having been duly published among the printed statutes as a law, and being therefore *prima facie* a valid law; in other words, that although the act might not have been duly passed, the town, under the circumstances of the case, was estopped from denying its passage. This court said: "We cannot assent to this view. There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same State. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case. It would be a very unseemly state of things, after the courts of Illinois have determined that a pretended statute of that State is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise." "As a matter of propriety and right, the decisions of the State courts on the question as to what are the laws of the State is binding upon those of the United States. But the law under consideration has been passed upon by the Supreme Court of Illinois, and held to be invalid. This ought to have been sufficient to govern the action of the court below. In our judgment, it was not necessary to have raised an issue on the subject, except by demurrer to the declaration. The court is bound to know the law without asking the advice of a jury on the subject. When once it became the settled construction of the Constitution of Illinois that no act can be deemed a valid law unless, by the journals of the legislature, it appears to have been regularly passed by both houses, it became the duty of the courts to take judicial notice of the journal entries in that regard. The courts of Illinois may decline to take that trouble, unless parties bring the matter to their attention; but, on general principles, the question as to the existence

of a law is a judicial one, and must be so regarded by the courts of the United States."

These principles were reaffirmed in *Post* v. *Supervisors* (*Amoskeag Bank* v. *Ottawa*), 105 *U. S.* 667.

It is said, however, that the Circuit Court of the United States could not have followed the cases referred to in the certified questions without departing from the principles announced by this court in *Field* v. *Clark*, 143 *U. S.* 649, 671, 672. This point deserves examination.

In the present case, the express mandate of the Constitution of North Carolina is that "no law shall be passed . . to impose any tax upon the people of the State or to allow the counties, cities or towns to do so . . unless the bill for that purpose shall have been read three several times in each house of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, *and unless* the yeas and nays on the second and third reading of the bill shall have been entered on the journal." Whether the absence from the journal of entries showing the required number of *readings* of a bill, on three different days, will be notice to all that the legislature has not conformed to the requirements of the Constitution in respect of such readings, is a question that need not be decided in this case. As the State Constitution does not expressly require those facts to be entered on the journal of legislative proceedings, it may be that when an enrolled bill, certified and duly authenticated by the presiding officers of the two houses, is approved by the Governor, it is to be conclusively presumed that the Constitution was complied with as to the mere readings of the bill. Without however expressing any opinion on that question, we remark that no such conclusive presumption can arise to defeat the express constitutional inhibition upon the passage of an act authorizing a county, city or town to impose taxes upon its people unless "the yeas and nays on the second and third reading of the bill shall have been entered on the journal." The object of that provision was to make such an entry on the journal a condition precedent to any legislation imposing taxes on the people. Every one who took municipal bonds to be paid by means of taxation authorized by the legislature was bound to know, from the face of the Constitution, that there was a want of power to issue such bonds and to impose such taxation, if the yeas and nays on the second and third readings of the bill were not entered on the journal. The constitutional requirement in that matter could not be dispensed with by the act of the presiding officers of the two houses of the General Assembly in certifying a bill as passed when the journal did not contain entries showing that to have been done which was necessary to be done before there was power to enact the bill into a law. These are the grounds upon which the Supreme Court of North Carolina have rested their decisions in the cases referred to in the first of the certified questions.

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The case of *Field* v. *Clark* was altogether different. In that case it was contended that a certain enrolled act of Congress in the custody of the Secretary of State and appearing upon its face to have become a law in the mode prescribed by the Constitution of the United States, was to be deemed a nullity in all its parts because it was shown by the Congressional record of proceedings, reports of committees of each house and other papers printed by authority of Congress that a section of the bill as it finally passed was not in the bill authenticated by the signatures of the presiding officers of the respective houses of Congress and approved by the President. The clause of the Constitution upon which that contention was based declares that "each house shall keep a journal of its proceedings, and from time to time publish the same, except such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal." *Art.* 1, § 5. It was not claimed in that case that a yea and nay vote was demanded by one-fifth of the members of either house on the passage of the section alleged to have been omitted, or on the passage of the bill as approved by the two houses of Congress. This court said: "In regard to certain matters, the Constitution expressly requires that they shall be entered on the journal. To what extent the validity of legislative action may be affected by the failure to have those matters entered on the journal, we need not inquire. No such question is presented for determination. But it is clear that, in respect to the particular mode in which, or with what fulness, shall be kept the proceedings of either house relating to matters not expressly required to be entered on the journals; whether bills, orders, resolutions, reports and amendments shall be entered at large on the journal, or only referred to and designated by their titles or by numbers; these and like matters were left to the discretion of the respective houses of Congress. Nor does any clause of that instrument, either expressly or by necessary implication, prescribe the mode in which the fact of the original passage of a bill by the House of Representatives and the Senate shall be authenticated, or preclude Congress from adopting any mode to that end which its wisdom suggests. Although the Constitution does not expressly require bills that have passed Congress to be attested by the signature of the presiding officers of the two houses, usage, the orderly conduct of legislative proceedings, and the rules under which the two bodies have acted since the organization of the Government, require that mode of authentication." It was then said: "The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction

of the legislative branch of the Government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries on its face a solemn assurance by the legislative and executive departments of the Government, charged, respectively with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept as having passed Congress all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."

So that in *Field* v. *Clark* the question substantially as now presented—namely, as to the effect upon legislation of the failure to enter upon the journals that which is expressly required by the State Constitution to be entered on them before an act can become a law—was not decided, but was in terms reserved from decision. Nothing said in that case conflicts with the judgments of the Supreme Court of North Carolina in the cases cited.

To avoid misapprehension it may be well to add that even if the decisions in North Carolina rested upon grounds inconsistent with the principles announced in *Field* v. *Clark* as applicable to the constitutional provisions relating to acts passed by Congress, it would be the duty of a Federal court to follow the rulings of the highest court of a State on the question whether a particular enactment found in the printed statutes had been passed in such a manner as to become, under its Constitution, a law of the State. Whether a different principle would apply in cases where rights had accrued under a statute previously adjudged by the State court to have been so passed as to become a law, we need not now inquire.

It is, however, earnestly contended that the county cannot escape liability even if the acts of 1868, 1879 and 1881 are disregarded as not having been passed so as to become laws; that the recital in each bond that it was issued under the authority of the act of 1879 does not estop the holders of bonds from showing that there was in fact ample authority to issue them, although such authority was not recited in the bonds. This contention rests mainly upon *Anderson County* v. *Beal*, 113 *U. S.* 227, 236, 237, 238 (1885). In that case it was said: "It is not disputed that that the recital in the bond that it was issued under the act of February 26th

1866, *Sess. Laws of Kansas*, 1866, *c.* 24, *p.* 72, was an error. . . It is very clear that there was legislative authority, under the act of 1869, for the issuing of the bonds in question. There was an election, and the requisite majority of those who voted assented to the proposition for the subscription to the stock and the issue of the bonds, and the subscription was made by the proper officers, and they issued the bonds. . . The bond recites the wrong act, but if that part of the recital be rejected, there remains the statement that the bond 'is executed and issued' 'in pursuance to the vote of the electors of Anderson County of September 13th 1869.' The act of 1869 provides that when the assent of a majority of those voting at the election is given to the subscription to the stock, the county commissioners shall make the subscription, and shall pay for it, and for the stock thereby agreed to be taken, by issuing to the company the bonds of the county." To the same effect is *Knox Co.* v. *Ninth National Bank*, 147 *U. S.* 91.

The point here made is not specifically embraced in either of the certified questions, but it is so closely connected with the question whether the Circuit Court should have followed the decisions of the Supreme Court of North Carolina in *Bank* v. *Commissioners*, *Commissioners* v. *Snuggs*, *Rodman* v. *Washington*, *Commissioners of Wilkes County* v. *Call*, and *Commissioners* v. *Payne*, above cited, that it ought to be examined.

Of course, if there was an absolute want of power to issue the bonds in question, every purchaser of them would be charged with notice of that fact, and could not look to the county in whose name they were issued. So that the inquiry must be whether the county had power to issue the bonds without the aid of any act passed after the Constitution of 1868 went into operation.

The plaintiffs insist that requisite authority was given by the Convention ordinance of March 9th 1868, and that it had been in effect so decided by the Supreme Court of the State before the bonds were issued in *Hill* v. *Commissioners*, 67 *N. C.* 367 (1870) and *Belo* v. *Commissioners*, 76 *N. C.* 469 (1877).

In *Hill* v. *Commissioners* the relief sought was an injunction to restrain the Commissioners of Forsyth County—into which the first division of the railroad was to be constructed—from imposing and collecting taxes to be applied in paying instalments due upon a subscription made by that county to the stock of the North Western North Carolina Railroad Company. The general question presented in that case, and the only one decided, was whether the legislature could constitutionally authorize a county to take stock in a railroad company under the sanction of a popular vote, and impose a tax to pay for such subscription. The Supreme Court of the State adjudged that such legislation would be legal. No reference was made to the ordinance of 1868 or to the ratifying act of August 11th

1868. Nor does it appear from the report of that case that any question was raised as to the validity of that act under the 14th section of Article 2 of the Constitution of the State, nor that evidence was offered to show whether the journals of the legislature contained any entry of the yea and nay vote on the second and third readings of the bill. Still, it must be taken that the ordinance of 1868 was assumed by the court in that case to be in force so far as Forsyth County, named in it, was concerned. The decision cannot however be regarded as authoritative upon the question whether Wilkes County had power, under that ordinance alone, to issue the bonds here involved.

In *Belo* v. *Commissioners* the relief sought was a judgment compelling the Commissioners of Forsyth County to provide for the payment of the bonds issued by them in payment of its subscription of stock to the North Western North Carolina Railroad Company. The Supreme Court of the State said: "The North Western North Carolina Railroad Company was incorporated by an ordinance of the Convention of 1868, and, by section 12 of the charter, the same power to subscribe to the capital stock of the company and subject to the like regulations and restrictions is given to counties and towns as was conferred by an act incorporating the Atlantic and North Carolina Railroad Company, passed by the legislature of 1852. By section 34 of the latter act the justices of the county through or near which the road was located, 'a majority concurring,' are authorized to fix upon a subscription sum and submit it to the voters of the county. If the majority favored subscription, the justices were to choose an agent to subscribe the stock voted and to prepare and issue county bonds, as the justices should direct. The minutes of the special term of the county court of Forsyth County, which ordered the proposition to be submitted to the popular vote, recite that a majority of the justices were present, concurring in the order. The vote resulted in favor of subscription, and was so certified to the succeeding court, held in June 1868. The minutes of that term recite that thirty-five justices were present, which number is admitted to be a majority of the whole number. At this latter term of the court the justices ordered the subscription to be made to the capital stock of the company, and the bonds to be prepared and issued and sold by the agent then chosen. The bonds were accordingly put upon the market, and among them the identical bonds now sued on were by the agent sold to one Lemly, at his banking house in Salem, on the 5th of March 1869. These bonds recite that they were 'authorized by an ordinance of 1868, by an order of the Court of Pleas and Quarter Sessions of Forsyth County at June term, 1868, and re-enacted and ratified and confirmed by an act of the General Assembly, ratified the 11th of August 1868.' At the same term at which the subscription was made the justices assessed a special tax upon the county to meet the semi-annual interest on the bonds. This special railroad tax was

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annually assessed, levied and collected and applied in the discharge of the accruing interest upon the bonds from that time until 1872. A certificate for the stock subscribed was issued by the railroad company to the county, which it yet holds; an agent was annually chosen to represent and did represent the county stock in all the meetings of the company. Under the new State Constitution of 1868 a Board of County Commissioners succeeded to all the powers and duties of the justices, and up to 1872 this board unanimously caused the levy and collection of the railroad tax and its application to the discharge of the coupons due upon the bonds. But the board elected in 1872 to refuse to assess any further tax and to pay any further interest upon the bonds, alleging as the reason therefor that the subscription of stock so made by the county was illegal and void."

Again: "For whether conditions precedent have been complied with is a matter of fact to be determined by some tribunal invested with the power and authority to decide it, and the decision when made should be final. It is not disputed that the *power* to make the subscription of stock and issue the bonds was conferred upon the county of Forsyth *by the ordinance of the Convention*. It is equally clear that the tribunal which was authorized to issue the bonds only on compliance with conditions precedent was the sole tribunal to determine the fact whether the conditions had been fulfilled. In our case the justices of the county, a majority concurring, was the court or tribunal designated to carry the law into effect, and was the tribunal to decide whether the conditions had been complied with, and their decision is final in a suit by a *bona fide* holder of the bonds against the municipality."

After considering the rights of the parties under the Convention ordinance of 1868, the court proceeded: "So far, as to the rights of the parties under the original act of the railroad corporation, granted by the Convention of 1868. But the plaintiff further relies upon a subsequent act of the legislature, ratified the 11th of August 1868, which confirms the original charter [ordinance] of March 1868. This act in express terms 'ratifies all acts and things heretofore done under the provisions of said ordinance,' and confers upon the 'Board of Commissioners of the county full power and authority to levy from time to time such tax as may be sufficient to pay the subscription made by said county to the capital stock of the North Western North Carolina Railroad Company and any interest due thereon, or to liquidate any debt created by the county in borrowing money to pay such stock subscription.' The competency of the legislature to enact retrospective statutes to validate an irregular or defective execution of power by a county corporation is well settled." The court then declared that the ratifying act of August 11th 1868 was a curative act and validated both the county subscription and the issue of the bonds, if any defects existed therein.

What was said in the *Belo* case about the validity of the act of August 11th 1868 as a curative statute, within the power of the legislature to pass, cannot be deemed as an adjudication upon the question whether that act was void upon the ground that the yeas and nays on the second and third readings of the bill were not entered on the journal. It does not appear that any such question was presented or considered, or that the journals of the legislature were in evidence or proved so that the question could have been decided.

But the *Belo* case involved other considerations. Forsyth County—whose liability on the bonds in suit in that case was directly involved—made the point that it had no authority to issue such bonds. The court however held that such authority was conferred by the Convention ordinance of March 9th 1868, and the subscription and bonds made in the name of that county to the North Western North Carolina Railroad Company were upheld as valid *under that ordinance*, which was recognized as part of the law of the State and as conferring authority on the county of Forsyth to do what it did.

It results that when the bonds here in question were issued in 1889, it was the law of North Carolina that the ordinance of 1868, constituting the charter of the North Western North Carolina Railroad Company, was not superseded by the Constitution of 1868, but was *in force* and therefore gave power to counties *embraced by its provisions* to take stock in that company and pay for it in county bonds just as Forsyth County had done.

Whether Wilkes County was so situated with reference to the contemplated road that it could be said to have had the same authority as was given to Forsyth County is a question not now decided.

In this connection we must allude to what was said in *Commissioners of Wilkes County* v. *Call*, 123 *N. C.* 308, 317 (1898). That was a suit brought by the Commissioners of Wilkes County against the County Treasurer to test the validity of the bonds issued in the name of that county to pay its subscription to the stock of the North Western North Carolina Railroad Company. No holder of bonds was made party to the original suit. In the progress of the case however two persons who became owners of *one* bond after the institution of the action were permitted to intervene. The Supreme Court of the State said: "We have not overlooked the fact that in *Belo* v. *Commissioners*, 76 *N. C.* 489, this court strongly intimates that section 12 of the charter did confer the authority given in section 33 of the act of 1852 [incorporating the Atlantic and North Carolina Railroad Company]; but it does so incidentally and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying act of 1868. This is clearly shown in the opinion itself, which devotes four pages to the discussion of equitable estoppel arising on the recitals, and

about half a page to the possible binding effect of the ordinance, winding up with the significant sentence on page 497 that 'as the case is presented to us, that question does not arise and we do *not* decide it.'" There is some ground for holding that the question which the court said was neither presented nor decided was whether the "justices could have been compelled by process of law to make the subscription, unless in defense they could have shown that the election was not fairly conducted, but was influenced by the fraud of the railroad company." Whether this be a correct interpretation of the opinion in the *Belo* case or not is immaterial; for that the ordinance of 1868 gave power to Forsyth County to make the subscription and issue bonds in payment of it was expressly affirmed in that case—indeed, it was not there disputed. So far from the *Belo* case turning, in part, upon the ratifying act of 1868, the court distinctly adjudged that the bonds were valid in the hands of *bona fide* holders under the ordinance of 1868 *without the aid of the act of August 11th* 1868.

A further reference must be made to the *Call* case. It was there said (*p.* 320) that "the ratification of the Constitution on the 24th day of April 1868, when it went into effect for all domestic purposes, annulled all special powers remaining unexecuted and not granted in strict accordance with its requirements." This view was again expressed in *Commissioners* v. *Payne*, 123 *N. C.* 432, 486–7. By Article 7, section 7, of the State Constitution it was provided that "no county, city, town or municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, *unless by a vote of a majority of the qualified voters therein.*" If the State court intended to adjudge in the *Call* and *Payne* cases that no municipal subscription to the stock of a railroad company could be made after the Constitution of 1868 took effect, except in conformity to section 7 of Article 7, we perceive no reason to doubt the correctness of such interpretation of that instrument; for it could not be that any unexecuted provision of the ordinance of 1868 inconsistent with the State Constitution could be executed. *Aspinwall* v. *Commissioners*, 22 *How.* 364; *Wadsworth* v. *Supervisors*, 102 *U. S.* 534, 537; *Norton* v. *Brownsville*, 129 *U. S.* 479, 490. But if it was intended to say that the State Constitution abrogated all authority previously given to make such municipal subscriptions, and that no such subscriptions could be made except pursuant to a new statute passed in conformity with the requirements of section 14 of Article 2, we are constrained to say that such a rule could not be applied in this case so as to violate any rights which the plaintiff had under the law of North Carolina as declared by the highest court of the State before the bonds here involved were issued. It is the settled doctrine of this court "that the question arising in a suit in a Federal court of the power of a municipal corporation to make negotiable securities is to be determined by the

law as judicially declared by the highest court of the State when the securities were issued, and that the rights and obligations of parties accruing under such a state of the law would not be affected by a different course of judicial decisions subsequently rendered any more than by subsequent legislation." *Loeb* v. *Trustees of Columbia Township*, 179 *U. S.* 472, 492, *and authorities there cited.*

We have referred fully to the *Hill* and *Belo* cases because of the earnest contention of learned counsel that under the law of North Carolina, as declared in those cases before the bonds in question were made, the ordinance of 1868, without the aid of subsequent legislation, gave full power to *Wilkes* county to issue such bonds. This view suggests various questions as to the scope and effect of that ordinance. Assuming, as we must, that the *Belo* and *Hill* cases held that the ordinance of 1868 remained in force after the adoption of the Constitution, did the general power given by that ordinance to the North Western Railroad Company to construct a railroad from its eastern terminus, "running by way of Salem and Winston, in Forsyth County, to *some* point in the northwestern boundary line of the State, *to be hereafter determined*," invest Wilkes County with authority to subscribe to the stock of the company and to issue bonds in payment of such subscription? Was Wilkes County in the same category with Forsyth County? Was the route of the road northwest of Salem and Winston to some point in the northwestern boundary line of the State to be determined by the legislature or by the company? If by the legislature, was that route ever determined otherwise than by the act of 1879, which has been adjudged never to have become a law of the State? Did Wilkes County have authority, under the ordinance of 1868 alone, to aid, by a subscription of stock and bonds, the construction of the second division of the road referred to in the act of 1879, extending from the towns of Winston and Salem, up the valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell?

These are matters about which we do not feel disposed to express an opinion under the very general and indefinite questions certified from the Circuit Court of Appeals. Nor do we deem it proper to express any opinion as to the scope and the effect upon the rights of the parties of sections 1996, 1997, 1998 and 1999 of the Code of North Carolina. The certified questions do not directly or explicitly relate to any question arising under those sections of the Code; and it is not appropriate that this court should, under the questions certified, consider and determine the entire merits of the case.

We answer the certified questions to this extent:

1. That the Circuit Court of the United States should have regarded the decisions of the Supreme Court of North Carolina in *Bank* v. *Commissioner s*

Commissioners v. *Snuggs, Rodman* v. *Washington, Commissioners of Wilkes County* v. *Call,* and *Commissioners* v. *Payne,* above cited, as controlling upon the inquiry whether the legislative enactments of 1868, 1879 and 1881 were passed *in such manner* as to become, under the Constitution, *laws* of the State.

2. That the rights of the parties in this case are determinable by the law of the State as it was declared by the State court to be at the time the bonds here involved were made in the name of the county and put upon the market.

These answers will be certified to the Circuit Court of Appeals.

True copy.

Test:

Clerk Supreme Court, U. S.